United States Court of Appeals

for the Second Circuit

APPENDIX

75-7132

B

United States Court of Appeals

For the Second Circuit.

CHARLES JAMES,

Plaintiff-Appellee,

against

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants-Appellants.

APPENDIX.

Volume II—Pages 433a to End.

UNITED STATES COURT OF APPEALS
FILED
MAR 25 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

HARRY TREININ,
Attorney for Defendants-Appellants,
11 East Market Street,
Corning, N. Y. 14830
(607) 962-3167.

BURT NEUBORNE,
Attorney for Plaintiff-Appellee,
New York University School of Law,
40 Washington Square South,
New York, N. Y. 10012

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1975

(6000)

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX.

Page

Docket Entries 1a

Complaint 3a

Answer 12a

Exhibits Annexed to Foregoing:

A. Affidavit of Edward J. Brown . . 21a

B. Decision by Commissioner of Education 25a

C. Letter from Robert H. Andrews, Pres. of Addison Bd. of Ed. dated November 15, 1969 . . . . . 33a

D. Letter from Herbert F. Johnson, Dep. Comm. of State Ed. Dept., dated November 3, 1969 . . . . . 34a

Notice of Motion for Leave to File a Brief Amici Curiae 39a

Affidavit of John P. Jehu, Read in Support of Foregoing Motion 40a

Notice of Motion by Defendants to Dismiss and for Judgment 43a

Notice of Motion by Plaintiff for Summary Judgment and in Opposition to Defendants' Motion to Dismiss 46a

Exhibits Annexed to Foregoing Affidavit:

Minutes of Elmira Meeting of Society of Friends 52a

Notice to Appear in Appeal to State Education 57a

Petitioner's Answer 59a

Page

Decision and Judgment Appealed From, Dated December 22, 1971 (First Appeal) . . . 64a

Notice of Appeal Dated December 29, 1971 (First Appeal) 67a

Decision of United States Court of Appeals (First Appeal) 69a

Opinion of Curtin, J., Dated August 11, 1972 . . 86a

Examination Before Trial Held on March 26, 1973 . 90a

Deposition of Kenneth B. Clark Taken on June 28, 1974 . . . . . 237a

Objections to Deposition of Kenneth B. Clark . . 315a

Transcript 317a

Motions 320a, 517a, 773a

Decision and Order of Curtin, J., Dated November 18, 1974 . . . . . 781a

Judgment Appealed From, Dated November 19, 1974 . 807a

Notice of Motion to Correct Judgment 808a

Proposed Corrected Judgment, Annexed to Notice of Motion 809a

Affidavit of Burt Neuborne in Support of Motion . 810a

Exhibit I, Annexed to Affidavit of Burt Neuborne--Judgment 812a

Exhibit II, Annexed to Affidavit of Burt Neuborne--Calculation 813a

Page

Affidavit of Harry Treinin in Opposition to Motion 816a

Supplemental Affidavit of Harry Treinin in Opposition to Motion 824a

Portions of Certificate of Incorporation, Annexed to Affidavit of Harry Treinin . . 829a

Reply Affidavit of Burt Neuborne in Support of Motion 832a

Exhibit 1, Annexed to Reply Affidavit of Burt Neuborne--Order of Appellate Division . . 837a

Responding Affidavit of Harry Treinin in Opposition to Motion 839a

Second Reply Affidavit of Burt Neuborne in Support of Motion 846a

Decision and Order of Curtin, J., Dated January 30, 1975 . . . . . 855a

Judgment Appealed From, Dated January 30, 1975 . 860a

Notice of Appeal 861a

TESTIMONY.

PLAINTIFF'S WITNESSES:

Page

Dee, Mary:

Direct 466a

Cross 468a

James, Charles G. Jr.:

Direct 343a

Cross 398a

Redirect 513a

Recross 515a

Witchey, Carol:

Direct 462a

Cross 464a

DEFENDANTS' WITNESSES:

Page

Brown, Edward J.:

Direct 518a

Cross 547a

Redirect 598a

Sheldon, Thomas D.:

Direct 711a

Cross 740a

Terino, Anthony E.:

Direct 609a

Cross 650a

MR. TREININ: That is all I prefer to read, your Honor.

THE COURT: You can just ask the Court to take judicial notice, and I will read the deposition. You offer it in evidence, Mr. Neuborne doesn't object?

MR. NEUBORNE: No, by all means, your Honor.

MR. TREININ: I will offer the whole thing in evidence. We are talking about the deposition of Mr. James.

THE COURT: Well, we will mark as an exhibit Mr. James' deposition.

(Whereupon deposition referred to was marked Defendant's Exhibit 1 and received in evidence.)

THE COURT: I think there are other --

MR. TREININ: There are others.

THE COURT: -- depositions. Only mark the James deposition.

BY MR. TREININ:

Q. Now, of course, we are concerned here with the use of symbolism, the armband was a symbol, is that correct?

A. That is right.

Q. And really it's use is a short cut for thinking?

A. Holy cow. I don't know how you mean that. I want you to tell me before I answer.

THE COURT: Mr. James, you know, if you can't understand the question, why don't you say I don't understand.

MR. NEUBORNE: Mr. James, confine yourself to simply asking Mr. Treinin to repeat a question if it seems obscure to you, all right?

THE WITNESS: All right.

THE COURT: If you don't think it is a short cut for thinking, say so.

THE WITNESS: I don't conceive the armband as a short cut for thinking.

BY MR. TREININ:

Q. And did you disagree with the discussion of the armband on Page 37 of the second section of the articles that were written by the author to whom we referred before?

THE COURT: Mr. Treinin, I don't know whether we could follow that question. Do you want to show Mr. James the portion of the article that you are referring to?

MR. TREININ: Yes.

MR. NEUBORNE: Should we mark the article, your

Honor?

THE COURT: We will eventually.

BY MR. TREININ:

Q. I show you the top of the first column on Page 37 of the New Yorker of June 24, 1974, where it says -- may I, your Honor -- where it says, "Symbols immediately convey meaning through a kind of emotional shorthand."?

A. Well, I would disagree with Holmes. I would say it is more than emotional shorthand, it is an intuitional one. There is, you know, really quite a bit of difference between emotion and intuition.

THE COURT: Is this a quote from Justice Holmes?

THE WITNESS: Yes.

BY MR. TREININ:

Q. Do you disagree with the good Justice?

THE COURT: He may.

MR. TREININ: Others have.

THE WITNESS: I think I'm incorrect. I know the quote.

THE COURT: I'm sure, Mr. Treinin, that both you and Mr. Neuborne also do.

MR. TREININ: On occasion.

BY MR. TREININ:

Q. However, whoever made the statement, it is more than emotional. And you, of course, reread this article and

agreed with it?

A. I agreed with the accuracy and interpretation of my statements.

Q. Did you disagree with the philosophy expressed by the author?

THE COURT: The article, Mr. Treinin, certainly I think we can all agree that it is a very long article. You mean as to the article's interpretation of the First Amendment and the discussion of the various cases that came up in the Supreme Court? That covers a lot of ground. If you want to ask him about a particular part of the article, you may. I think you should be specific.

BY MR. TREININ:

Q. Would you agree with the statement on Page 37, first column, toward the bottom, "But that reliance -- as refers to symbols -- may also create and exacerbate discord within a nation, for the innate power of symbols can arouse the most passionate feeling of reverence, hope and love in one person, can arouse equally a passionate feeling of scorn, fear and hatred in another."

A. Sure, that is why I said at the beginning what kind of symbol was the most meaningful and least offensive.

Q. You agree with the rationale of the author when he made that statement?

A. Yes.

Q. Now, when you wore this in the classroom, you also intended certainly to wear it the entire day?

A. Right.

Q. That would necessitate your appearance in the corridors, in the lunchroom and in the study hall, as well as in the classroom?

A. Essentially, but I usually carry my lunch and eat in the teachers' room.

Q. In other words, wherever you were scheduled to appear in school that day?

A. That is right.

Q. And when you wore it, did you give any thought as to what effect it would have on the children, your students, or anyone who saw it?

A. I sure did.

Q. And what consideration did you give to that, Mr. James?

A. The primary thought I had was if in upstate New York where peace wasn't even talked about hardly, if somebody saw a symbol that implied there was one person on this faculty, in this place or in the community even -- I don't think I identified it with the faculty as much as part of the group there present -- that wore something

that actually said life is precious, life is meaningful, that this could possibly, you know, create thought, and somebody would think maybe that is true, maybe this is something worth thinking about, and they might think about it then or they might twenty years later remember and think there are other solutions to problems than those that are primarily efficient rather than humanitarian.

Q. Did it occur to you that to some it might constitute an expression against participation in the Viet Nam War?

A. No, I didn't think of it in that relationship. It obviously was not a pro-war statement.

Q. So it never occurred to you that to students -- to some of the students it might be considered as an expression of opposition against the conduct of the war?

A. I didn't try to run down all the possible responses to the students in my mind.

Q. Did it occur to you that some might have that reaction?

A. I don't remember whether that thought ever went through my mind or not.

Q. On Page 119 was this question asked and did you make this reply: "Did you know, as an intelligent person, growing up, doing reading, discussing and that, that this armband stood in the pupil's mind as an expression against participation in the Viet Nam War, you appreciate that fact, did you not?" And the answer was, "Yes."

A. Apparently I knew more then than I know today.

THE COURT: Is it correct?

THE WITNESS: It is probably correct, yes.

THE COURT: Next question, please.

BY MR. TREININ:

Q. "And you realize to them, to some people, that your wearing this was against the policies of the Administration in Washington?" Did you make the reply, "To those people, right."

A. Would you repeat that, please?

Q. Yes. "You realize to them"-- your previous answer was, "Some people." "You realize to them your wearing this was against the policies of the Administration in Washington?" The answer was, "To those people, right."

A. Yes, some people would have seen the armband as some kind of opposition to the Administration. Once again, that is why I'm here.

Q. And did you consider this, your gesture, as a continuation of your whole life's activity in reference to the peace movement and your general philosophy?

A. I considered it harmonious with it, yes.

Q. Did you say, "Those years of writing letters, preaching, speaking, arguing and marching against the war would be rendered hollow if I didn't wear it. I wore it."

A. Yes, I said that. Of course, that context was the morning,

as I was making a final consideration of that, you know, thing that had been gestating in my mind over that period of time.

Q. Now, was there ever any doubt in your mind as to whether rightly or wrongly how the School Board considered your act, in what light it considered your act?

A. Starting at what point?

Q. After you received the letter on November 15th.

A. From all the evidence that I had, there was no doubt. If I was to believe the evidence, they were not supportive of it.

Q. On what grounds?

A. Because they were supportive of my dismissal.

Q. Yes, but on what grounds, in respect to their feelings as to the wearing of the armband?

A. They interpreted it as a political act.

Q. Now, you had -- after Mr. Pillard called you, you had some slight discussion with him, you came to see Mr. Brown -- we are talking on November 14th -- and how long did that meeting last?

A. I suspect it was about a half hour, that would be my guess.

Q. Did you quarrel?

A. No, I guess it wasn't a quarrel.

Q. It was a discussion?

A. It was a discussion.

Q. It was rather in low key, all in all?

A. Essentially, yes.

Q. You disagreed, and you disagreed like gentlemen?

A. Yes.

Q. And did Mr. Brown make a statement that he denied your right to wear the armband except near the schoolhouse?

A. No. I mean he didn't deny my right to wear the armband --

Q. Outside?

A. -- outside of the schoolhouse.

Q. His objection was only in your appearance as a teacher in the classroom with the armband, is that right?

A. His objection was to my appearance as a teacher, right.

Q. And did you discuss the role of the teacher in the classroom?

A. Yes, I think we did.

Q. And did you discuss the code of ethics of the teacher?

A. Not the code of ethics, no.

Q. Or --

THE COURT: Mr. Treinin, you say there is a code of ethics?

MR. TREININ: I hope to put it in evidence.

THE COURT: All right.

THE WITNESS: There are several codes of ethics.

BY MR. TREININ:

Q. But you talked along those lines about ethics?

THE COURT: Does the code of ethics say teachers can't wear symbols in classrooms?

MR. TREININ: I don't want to say exactly what it says --

THE COURT: You are talking about the code of ethics in a general way, and I think it is very difficult --

MR. TREININ: I hope to come to that.

THE COURT: --for the Court and the witness to know what you are referring to.

BY MR. TREININ:

Q. At that time --

THE COURT: First of all, Mr. James, can you recall, was there any conversation with Mr. Brown about the code of ethics?

THE WITNESS: Not in using the term code of ethics.

BY MR. TREININ:

Q. What sort of conversation was there in reference to that phase of the matter?

A. Mr. Brown said that he felt that I was endangering the children. I don't mean those were the words, that was the expression that was meant. My response was, well, it seems to me, knowing the content of education courses

and the concepts, at least on paper, of American education, that in reality an administrator would be delighted to have somebody on the faculty that would bring a different quality and a different aspect of life into the context of the schoolroom. This was supportive of all the philosophies that had been promoted by educators.

Q. You previously told us that you recognized that people certainly differed about the war issue. Did it occur to you that in wearing the armband you were presenting only one side of a very terrible issue, vital to the country?

A. No, I was not doing that, in the sense that I was not teaching about war at the time, I was teaching poetry. The symbol had not been interpreted yet.

Q. Did you say the symbol had not been interpreted?

A. Not by the students, that is what I meant.

Q. Were you acquainted with the case where the Supreme Court had acted in the situation of children of Friends, the Des Moines case?

A. My students hadn't interpreted my symbol.

Q. May I ask that you reply to my previous question? Were you aware that the Society of Friends brought an action that ultimately came to the Supreme Court --

THE COURT: Mr. Treinin, again, there is so many cases --

MR. TREININ: In the Des Moines case.

THE WITNESS: No, I didn't know anything about the Des Moines case at the time, that was post-armband.

BY MR. TREININ:

Q. And did Mr. Brown object on the basis that you were presenting only one side, was that stated?

THE COURT: Mr. Treinin, I hate to interfere, but does Mr. Brown require the other teachers in the school to wear black armbands so that they can then get the anti-war view?

MR. TREININ: No.

THE COURT: All right, continue with your question.

BY MR. TREININ:

Q. What further was discussed between you and Mr. Brown? Did he talk about politics in the classroom?

A. Well, like I said, he said it was a political act. I don't know whether in our first conversation of the 14th there was any real discussion of politics in the classroom. He considered it a political act, and he considered it something he did not want to have happen to the students, and that he did not want me in the room with the armband on.

Q. Did he talk about the necessity of presenting all sides

of controversial issues as the duty of the teacher?

A. He may have. That might have been the cause of my response regarding having a variety of people on the faculty.

Q. Did he also say that a teacher has a right to express his own opinions on controversial issues in the classroom, as long as he explains all other points of view?

A. I'm sure he said that to me. I'm not sure whether it was on the 14th or 12th of November. I'm willing to say he said that that day. I just -- that is one of those things that on paper is beautiful, you have all sides to the question, which no teacher can do.

Q. Isn't that a part of the teacher's duty, to try to educate the child in all parts of the controversial issue?

A. You should make them aware of it, that is why I made the distinction about my not teaching that day on war.

Q. You were not teaching, did you say, that day?

A. My lesson was not oriented to the question of war and peace that day.

Q. Don't you feel that the overall impact made by a teacher has an effect on the student?

A. Of course.

Q. Whether it's the style of hair or style of clothing or manner of speech or mode of expression, doesn't it all

have an effect on the educational impact on the student?

A. Surely.

Q. And didn't you consider that your wearing the armband would also have an educational impact on the students?

A. I sure hoped somebody would think there was somebody who thought that life was precious.

Q. Did you hear my question?

THE COURT: He answered it, Mr. Treinin. Let's move on. We're going over the same ground again and again and again.

BY MR. TREININ:

Q. Did Mr. Brown, during this conversation, say to you, "I'm responsible for these children."?

A. Essentially, yes.

Q. Did he also say to you that he had also the obligation not only to consider the immediate effects of your wearing the armband, but the long-range point of view?

A. I don't know, but probably.

Q. Did he also say to you that he had some doubts about his position, that he wanted to think it over and obtain counsel?

A. The only doubt that I remember him expressing is the doubt about whether he had a right to get rid of me.

Q. Did Mr. Brown ever say that he was going to get rid of

you?

A. If he could, yes.

Q. He said that?

A. Yes.

Q. In those words?

A. Yes.

Q. Had you ever expressed that in this lawsuit prior to this morning?

A. I don't know. I wrote it in a letter to counsel at one time.

Q. Had you ever expressed it before this morning, in the examination or in any of your papers?

THE COURT: When Mr. Treinin says examination, he is referring to the deposition he read before.

THE WITNESS: I don't think so.

BY MR. TREININ:

Q. So that was something that you first stated this morning, that he was trying to get rid of you?

A. That is right.

Q. Now, if he were trying to get rid of you, is that consistent with the letter that you got within two days -- no, the very next day -- asking you to come back to the classroom?

A. I don't see the competition with each other. He didn't say summarily --

Q. He didn't say what?

A. Instantaneously.

Q. Where would you expect him to say summarily or instantaneously?

A. What I mean is I didn't -- I don't -- if the gentleman desires that I not be present in the system because he feels my teaching isn't the kind he wants, and he says he would like to get rid of me if he could, I don't see anything about that that is anything except an honest statement about his feelings. That doesn't say tomorrow morning, is what I am trying to say. He didn't say I want to get rid of you now.

Q. May I ask, is the letter you received the next day consistent with an effort to get rid of you? You were invited back, weren't you, Mr. James?

A. I was invited to come back on Monday.

Q. You came back on Monday, is that right?

A. Yes.

Q. And you taught for approximately a month --

A. Yes.

Q. -- without incident?

A. That is right?

Q. Did Mr. Brown ever bring up the question of the armband

to you during that entire month?

A. No.

Q. Did anyone else on the Administration bring it up to you?

A. No.

Q. In other words, you were there for a month as if nothing had happened?

A. Yes, even though something had happened.

Q. But had anything overt happened, Mr. James?

A. There was nothing said to me about the armband by any administrator between the two armbands.

Q. Tell us what did happen?

A. I don't understand your question.

THE COURT: You mean about the next incident?

MR. TREININ: No, I'm sorry.

BY MR. TREININ:

Q. Did your fellow teachers take cognizance of this event?

A. That is right.

Q. What did they do?

A. There was a faculty meeting at which there was a vote taken regarding support of a principal, and a statement read by faculty members, as a result of which a vote was taken to support the principal, the actions of the principal.

MR. TREININ: May I have these marked? I assume it would be perhaps the better practice to mark it whatever number A and B.

THE COURT: Defendant's Exhibits, give them the next number. Mark them separately.

(Thereupon documents referred to were marked Defendants' Exhibit 2 and 2A for identification.)

MR. NEUBORNE: May I have a voir dire? Are you going to offer this?

MR. TREININ: Yes, I intend to anyway.

MR. NEUBORNE: May I have a voir dire?

THE COURT: Yes. Do you want to ask a question about them?

MR. TREININ: Perhaps his Honor should see them.

MR. NEUBORNE: I have no objection to that. I simply wanted to examine on the circumstances surrounding this, but if you will bring it out --

MR. TREININ: Sure.

BY MR. TREININ:

Q. Were you present -- were you a member of the Teachers

Association?

A. Not that year, no.

Q. There was a Teachers Association?

A. Yes.

Q. Were you present at the meeting at which a resolution concerning your activity was taken by the teachers?

A. Yes, I was.

Q. What do you mean by "someone"?

A. Yes, I was.

Q. Oh, I'm sorry, I apologize. I thought you said someone. And at that time was the matter of your armband incident on the first occasion discussed by the teachers?

A. Yes. The only faculty meeting I remember is the one in which the resolution was presented by the faculty members in support of Mr. Brown's suspending me.

Q. And was it debated by the teachers?

A. Some, yes.

Q. And was a resolution passed?

A. The resolution was passed.

THE COURT: Were you present at the meeting?

THE WITNESS: Yes, I was.

BY MR. TREININ:

Q. I ask you whether Exhibit 2 is the resolution that was passed? Take your time and read it.

MR. NEUBORNE: When Mr. James is finished reading, I would like a moment to voir dire.

THE COURT: Surely.

THE WITNESS: Yes.

PRELIMINARY EXAMINATION BY MR. NEUBORNE:

Q. Do you have an independent recollection that that is the exact resolution that was passed by the teachers?

A. No.

MR. NEUBORNE: I object to it.

THE COURT: Well, Mr. Treinin, you can ask him about it.

THE WITNESS: I have more of an emotional recollection.

THE COURT: Maybe you can in some way fill in the blanks on that. If you want to ask Mr. James some questions about it, you may.

BY MR. TREININ:

Q. At that meeting there were discussions pro and con on your position?

A. Yes.

Q. And ultimately was a resolution offered?

A. The resolution, as I remember, was offered first, after

which there was a brief discussion and a vote taken.

Q. Was it -- as a result of the vote, was the resolution passed?

A. Yes. That is what I believe the vote was on, the acceptance or rejection of the resolution.

Q. The resolution generally approved the action of the Board in your suspension?

A. Yes.

Q. And, of course, you wouldn't know anything about -- was Mr. Davis the president of the Addison Teachers Association at that time?

A. I don't remember.

MR. TREININ: May I offer Exhibit 2 in evidence?

THE COURT: I will withhold ruling on it until we hear further testimony.

MR. TREININ: All right, your Honor.

BY MR. TREININ:

Q. You said other things had happened. Was one of the things that happened in the meantime, in that interim, the month, the resolution that we just discussed?

A. What was the date on that?

Q. November 18, 1969?

A. That would be the week immediately following.

Q. Did anything else happen that you might have referred to --

THE COURT: You mean faculty meetings? We heard about the newspaper articles, protests or anything like that?

MR. TREININ: He said that --

THE COURT: He heard nothing from the Administration.

MR. TREININ: He heard nothing from the Administration but other things happened, I'm asking what otner things happened.

THE COURT: During this interim do you remember anything else happening, Mr. James?

THE WITNESS: I just remember going about my teaching duties. I don't remember any special events.

THE COURT: Outside of the teaching duties?

THE WITNESS: No, I don't remember anything.

THE COURT: You can't remember anything else. All right, go ahead.

BY MR. TREININ:

Q. Approximately thirty days went quietly, as far as your relation with Mr. Brown and the Administration was concerned, is that correct?

A. Yes.

Q. The only problem that you had was with your fellow

teachers, in reference to the resolution?

A. Yes.

Q. Now, you, of course, studied the letter that you had received from the Board?

A. Right.

MR. TREININ: Isn't that in evidence, your Honor?

THE COURT: This is the first letter, is that it?

MR. TREININ: Yes. Have you got it there? Thank you.

BY MR. TREININ:

Q. And you had a pretty good idea of what the Board thought about the implications of wearing the armband?

A. That is correct.

Q. And you thought differently?

A. That is correct.

Q. Now, before you wore the armband on the second occasion, did you give any consideration to discussing your differences with the Board?

A. I don't remember when the appeal for an audience was. What was the date for that?

Q. I think that was after the second occasion, that is my recollection.

A. Then between those two intervening times I didn't consider--

you know, that I recollect -- ever having an audience with the Board.

Q. You never gave it any thought?

A. Not that I recall.

Q. Now, in view of the statement in the letter, "You may return to class on Monday, November 17, 1969, with the understanding that you engage in no political activities while in the school," and in view of the prior statement that they considered the wearing of the armband to be political --

THE COURT: You are reading from the letter?

MR. TREININ: Yes.

THE COURT: If you are going to read, please read. If you are going to ask a question, ask a question.

MR. TREININ: May I start anew?

THE COURT: Yes.

BY MR. TREININ:

Q. In view of the third paragraph in the letter, "You may return to class on Monday, November 17, 1969, with the understanding that you engage in no political activities while in the school," and in view of the first sentence in the letter -- the second paragraph -- that the Board deems your action to be political act, did it occur to

you that perhaps you should discuss the matter with the Board or the Administration before wearing the armband on the second occasion?

A. No.

Q. Would you tell us why not?

A. I would love to. I have been waiting for that question.

Q. All right, here's your opportunity.

A. In the first place, I didn't -- I received that letter when I was away from the house --

Q. You certainly knew it in the interim of thirty days?

A. Let me answer.

THE COURT: Let him answer. Go ahead.

THE WITNESS: In the meantime I had talked with the Civil Liberty Union, with Harrop Freeman, and as a result of that conversation I had been assured that my deep-rooted American sympathies about my rights and freedoms were valid, and that I was within my Constitutional rights, and that a letter expressing that Constitutional fact would be addressed to the school, would arrive at the school at the time I re-arrived, and not to entertain any further concerns about my act, that my act was Constitutionally valid, and that

regardless of the feelings of the Board, that I was within my rights.

BY MR. TREININ:

Q. You were an employee of the Board?

A. Yes.

Q. And did you feel that you owed them some consideration in this matter?

A. I don't understand the question.

Q. Didn't you feel, as one human being, trying to get along with a group of other human beings, who were doing a very responsible duty to the community, by the way, at no pay, and you happened to disagree with them, that they had as much right to their opinion as you had?

A. Of course, I did.

Q. Of course. And didn't you feel --

THE COURT: Mr. Treinin, let the witness answer the question.

BY MR. TREININ:

Q. All right. Do you want to answer further?

A. I feel so strongly that they have a right to their opinion.

Q. So there was a clash of honest difference of opinions?

A. Yes.

Q. Here was a group of citizens doing their duty as they saw

it, and you doing your duty as you saw it?

A. Exactly.

Q. Wasn't it reasonable to at least sit down and talk to them?

A. My response to that is that I could not believe that after that letter had been received by the Board and the Administration that they didn't respond in some sort of an admission of a travesty against my rights. I never received that in that entire period. You and I just confirmed it, there was no communication between the Board or the Administration and myself between the 14th and the 12th.

Q. You received the letter on the 15th, did you not?

A. The letter came to my house while I was away, which was a Saturday. In the meantime the letter from Mr. Freeman and Mr. Burgivon of the Tompkins American Civil Liberty Union Chapter reached the school at the time I returned to the school. There was an intervening approximate month in which some kind of an apology could have been addressed to me about the infringement of rights, and that apology was never addressed to me.

Q. In other words, you went on the premise that because Mr. Harrop Freeman uttered an opinion, that that was the final word on a highly controversial issue?

A. That premise plus my experience as a student of history

and the American school system.

Q. But you gave no validity at all, no weight at all to the opinion of a group of citizens who are doing their level best to run a school system?

A. I gave validity to it. Of course I gave validity to it. I didn't say it was invalid. We disagreed, and they had a right to their opinion, and I considered their opinion valid. I anticipated they wouldn't be happy with my wearing the armband the second time.

Q. You anticipated that they wouldn't be happy?

A. Of course not. Why would they be happy?

Q. Then with that expectation, wasn't it all the more reason for two decent opposing groups to sit down and talk it over?

A. I have answered that question.

Q. Would you answer it again?

A. I expected them to come to me with some kind of an apology and they didn't do it.

Q. What would you think if they took the attitude that you should come to them with an apology, Mr. James?

A. I would be thinking that that was consistent with the interpretation of their opinion you have given me.

Q. In other words, sir, you feel that your opinion is right and the opposite opinion is wrong?

A. No.

Q. What is your feeling on the matter, tell us, please?

A. I believe, as I still believe, in almost a childlike way, that that is where I belong, and this was unbelievable to me that anybody could think that I didn't have a Constitutional right to express my conviction in this manner.

Q. As a student of history, as a student of American government, certainly you are aware of the great controversies that wrack our society and the decisions that come down from our courts almost equally divided, and people of good principles and good hearts disagree on these issues --

THE COURT: Mr. Treinin, there is no objection to that question, but I think that --

MR. TREININ: I will go to another field.

THE COURT: Can we get down to the facts? Let's do this. Let us take a brief recess.

MR. TREININ: Thank you. I would appreciate it.

(Thereupon the Court was in recess at 3:35 p.m.)

(Thereupon a document was marked Defendants' Exhibit 3 for identification.)

* * * * * * * * *

(PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 4:00 p.m.)

MR. NEUBORNE: Excuse me, your Honor, I have two witnesses who came in from out of town, both of whom would be on not more than five minutes. While they really don't come in at this part of the case, if the Court would excuse Mr. James for a moment, I could put them on and get that into the record, and they could go home.

THE COURT: Would that be agreeable?

MR. TREININ: Of course, your Honor.

THE COURT: Why don't you step down for a minute, Mr. James?

MR. NEUBORNE: At this time plaintiff calls Carol Witchey.

C A R O L W I T C H E Y, called as a witness on behalf of the Plaintiff, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NEUBORNE:

Q. Miss Witchey, what is your occupation?

A. I'm a teacher.

Q. Where are you teaching?

A. I teach at Addison, New York.

Q. At the Addison High School?

A. Yes.

Q. What subjects do you teach?

A. English.

Q. Were you a teacher at Addison in the 1969-1970 school year?

A. I was.

Q. Now, on December 12, 1969, did you have a conversation with Mr. Brown?

A. Yes, I did.

Q. And was anyone else present when you had that conversation?

A. Yes, there were two other teachers, Alexis Davis, a French teacher, and Maxine Barber, an English teacher.

Q. At that conversation, did you mention to Mr. Brown anything concerning -- I will withdraw that. Can you tell us what you told Mr. Brown at that conversation?

A. We told him we had feelings about, you know, what was happening, and among the things that we told him was that there was a bulletin board in the school that said Peace With Honor, and this didn't seem to be showing both sides anymore than, as you were saying, the armband wasn't showing both sides, the bulletin board wasn't showing both sides either.

MR. NEUBORNE: That is all I want. I have no

further questions.

THE COURT: Just a minute, Miss Witchey. Do you have any questions, Mr. Treinin?

CROSS EXAMINATION BY MR. TREININ:

Q. Did you know whose classroom that appeared in?

A. I thought I knew. I didn't see it.

Q. You didn't see it?

A. No, I didn't see it.

Q. Then you are telling us something that someone else told you?

A. That is right.

Q. Who told you?

A. Another teacher who had a daughter who was in the class of another teacher.

Q. So this isn't on your personal knowledge?

A. That is right.

MR. TREININ: If the Court please, I move to strike out the witness' testimony.

MR. NEUBORNE: Your Honor, I offer it for two reasons --

THE COURT: Of course, whether or not she learned this from someone else, this is what she said to Mr. Brown.

MR. NEUBORNE: I was also setting the stage for

impeachment at a later stage.

MR. TREININ: If it is offered only as to the fact she made the statement to Mr. Brown --

MR. NEUBORNE: Yes.

BY MR. TREININ:

Q. You don't know on your own knowledge whether it is true or not?

A. That is right.

Q. Where did the conference occur?

A. In Mr. Brown's office.

Q. On what date?

A. I believe it was the day of the second time that Charlie was dismissed.

Q. What time of day?

A. I'm really not sure. The three of us had been sitting in the teachers' room, talking, and I know there was a spontaneous decision to "Hey, let's talk to Mr. Brown about this."

Q. You don't recall whether it was early in the day or at the end of the day?

A. No, I don't.

MR. TREININ: That is all, thank you.

THE COURT: Thank you, Miss Witchey. Next witness.

(Witness excused.)

MR. NEUBORNE: Miss Mary Dee, please.

M A R Y D E E, called as a witness on behalf of the Plaintiff, and having first duly affirmed, testified as follows:

MR. NEUBORNE: Would you mark this?

(Thereupon document referred to was marked Plaintiff's Exhibit 7 for identification.)

DIRECT EXAMINATION BY MR. NEUBORNE:

Q. Mrs. Dee, were you a member of the Elmira Meeting in 1969?

A. I was an attender at that time. I became a member after that.

Q. Did you attend regularly back in 1969?

A. Yes, I did.

Q. When did you begin attending the Elmira Meeting?

A. Actually it was this very fall. I just happened coincidentally to be joining at that time.

THE COURT: That was 1969?

THE WITNESS: Yes, at the time of the moratoriums and so forth.

BY MR. NEUBORNE:

Q. Now, I ask you to look at Plaintiff's Exhibit 7 for a moment, and have you ever seen it before?

A. Yes.

Q. Did you write that statement, Mrs. Dee?

A. Yes, I did.

Q. Could you tell us how you came to write it?

A. As an attender of the Elmira Meeting, in which we were involved together in this testimony for peace and in this horror of this war, we were all involved in this and felt that what Charles did, he did as one of us. We all were wearing armbands, we all were doing everything that we could to make a peaceable statement of our deep concern.

Q. And was the statement, as you wrote it, adopted by the members of the Meeting?

A. Yes.

Q. Is this your signature at the end of the statement?

A. Yes.

MR. NEUBORNE: Your Honor, at this time I offer Plaintiff's Exhibit 7 as the statement of the Elmira Meeting of the Society of Friends, describing the black armband and

its purpose.

MR. TREININ: Your Honor, I fail to see the relevancy, but I have no great objection to a fine statement by a group of fine people.

MR. NEUBORNE: Thank you.

THE COURT: It may be marked in evidence.

MR. NEUBORNE: Thank you, Mrs. Dee.

MR. TREININ: I would like to examine her.

THE COURT: All right.

(Thereupon Plaintiff's Exhibit 7, previously marked for identification, was received and marked in evidence.)

CROSS EXAMINATION BY MR. TREININ:

Q. Mrs. Dee, when you adopted this statement, was Mr. James present?

A. No, this was -- in fact, I think they were -- Neva and Charles were the only ones not present at this meeting.

Q. Was --

A. No, one other person was absent, but it was a full attendance.

Q. Was any attempt made to find out the point of view of the Addison School Board or Mr. Brown?

A. This wasn't our concern. This was a religious concern that concerned all of us. This was a projection or an action that was taken in which one of our members was experiencing sufferings out of our concerted action that we had chosen to do. We were concerned.

Q. As a group, you were critical of the Addison School Board?

A. Of the -- ?

Q. Addison School Board.

A. We were horrified, as a matter of fact. As the statement says, we all wore the black armbands into business, hospitals, wherever our work was, and no one else ran into this opposition. Of course, I realize schools are different, but we had other teachers who also wore black armbands and found no reaction in terms of --

Q. But you do realize that schools are different?

A. From what, sir?

Q. From let's say outside of the schoolroom. Did you know that Mr. James' right to wear the armband outside of the school was not in anyway questioned?

A. It seemed to me the most healthy kind of education. That was an opinion on my part.

Q. Will you please answer the question? Did you know that the right of Mr. James to wear the armband outside the classroom was not in any way questioned?

A. Oh, outside the classroom?

Q. Yes.

A. Yes, I guess so.

Q. I see. And that perhaps educators with certain specified responsibilities felt that in terms of their professional duties they had to take a certain stand on this matter?

A. Would you please repeat that question?

MR. TREININ: Would you read it back, please?

(Thereupon the last question was read by the reporter.)

THE WITNESS: That sounds very vague, but I guess I can agree with it. I don't see your point, Mr. Treinin.

BY MR. TREININ:

Q. Well, did you find out later that Mr. Nyquist, the Commissioner of Education, agreed with the stand of the Addison School Board?

A. This came with some shock, yes.

Q. Certainly you respect Mr. Nyquist as an educator?

A. Less after that.

Q. Before that you respected him? Mr. Nyquist would feel chagrined by your statement. But from the point of view of the Quaker faith, before you make up your mind on any

particular issue, don't you look at all sides of that issue?

A. No, we look -- if I can make as clear a statement as I can -- we look into our own hearts and consciences, and together we kind of pray over it, and rather than coming to any majority decision, we come to a sense of meeting, in which together we decide to act, and if there is one person who objects to our action, he can hold up our action by stating, 'I can't in good conscience go along with this group action.'

Q. I say this respectfully; do you realize that other people, just as religiously oriented, with as fine basic sentiments as the members of the Quaker faith, can also look at this or at any problem and come up with an opposite point of view?

A. Of course.

Q. Shouldn't the opposite point of view be respected?

A. I believe that is what this trial is all about.

Q. And, certainly, you are not going to say that the Board's point of view, Mr. Nyquist's point of view or Mr. Brown's point of view should deserve any less respect than your point of view?

A. That is right.

MR. TREININ: Thank you very much.

THE COURT: Thank you.

(Witness excused.)

MR. NEUBORNE: Mr. James is prepared to take the stand, if your Honor please.

C H A R L E S J A M E S, called as a witness on his own behalf, and having previously duly affirmed, resumed and testified further as follows:

CROSS EXAMINATION BY MR. TREININ: (Continued)

Q. Mr. James, when the Court called a recess, we had discussed the situation as you were making up your mind to wear the armband on the second occasion, and you generally felt that it wasn't your obligation to discuss your proposed wearing of the armband with the Board?

A. That's correct.

Q. Then after that you had another meeting with Mr. Brown when you wore the armband the second time?

A. That morning, yes.

Q. That morning. How long did the meeting last?

A. Well, it wasn't as long as the first one.

Q. What was the general nature of the conversation between the two of you?

A. There are two things I can highlight -- I'm sure you have

some material there to refresh my memory -- there was a brief exchange in which Mr. Brown felt that I had showed a lack of wisdom in wearing the armband the second time, and then he went through a list of hypothetical options regarding redress of grievances. That is the two things that stand out in my mind.

Q. What was his list of hypothetical options?

A. Well, I don't recall for sure. I think he said something about carrying it to the Teachers Association, and I think that was -- the idea of that in his mind was that the Teachers Association is in some way a link to the larger arm of the teachers organization. I don't recall the other specifics.

Q. Was there any discussion of a possible solution by perhaps bringing an action for a day's pay that could be withheld so that the issue could be resolved amicably as an intellectual issue?

A. I do recall -- I think I'm fairly sure -- that at that time there was a suggestion -- well, no, I'm not. One of the two times I talked to Mr. Brown, I'm not certain which, the suggestion was made that I take off the armband until, you know, an answer, a legal answer was found. I don't remember anything about a day's pay, I really don't.

Q. Wasn't there a suggestion made that perhaps some action

could be brought so that the matter could be resolved amicably and you continue teaching?

A. There could have been a statement regarding -- in my mind, I link that with the idea that it was supposed to be my relinquishing the armband. I'm not sure, I'm really not clear.

Q. Isn't it fair to say that Ed Brown was making every effort to obtain an amicable solution of the dilemma?

A. I can only testify as to facts. I don't know what his intentions were.

Q. Was there any fact --

A. He gave me the fact about redress of grievances. I'm sure there were two or three points, but I only recall one.

Q. They were all consistent with the idea of let's get together and solve this problem?

A. The tone was (a) suspension, (b) redress. That's all I recall.

Q. Redress was important to Mr. Brown in the context of all his conversations?

A. It wasn't mentioned at all the first time, no. That is why the question becomes very difficult for me. I am sure that, you know, functional social-political reasons were also present, not just a desire for justice.

Q. Well, is it fair to say that both of you sought an amicable solution of this dilemma?

A. No, that wasn't the tone. I don't think that was the tone of the conversation at all. I think the tone was Charles, Mr. James, you are suspended, but you have these rights. That is the way I conceive of it.

Q. And in discussing these rights, did he mention the right of the teacher to express his own opinion on controversial issues as long as he mentions all the other points of view?

A. I'm sure he did.

Q. So that your right to wear the armband and explain it to the students was recognized, wasn't it?

A. No.

Q. You just told us --

A. I was told to take it off, Mr. Treinin.

Q. But there was conversation about your right to wear it and explain it to the students?

A. This was a hypothetical thing. If I were a Social Studies teacher and the lesson plan dealt with that type of issue, you know, then there could be a justification for wearing an armband and using it as a class illustration of right, as one point -- I should say of an expression of one point of view.

Q. I notice you are having difficulty with your answer, Mr. James. Is there something else you want to tell us about that?

A. No. I'm trying to remember, I'm not having difficulty. It is not quite as vivid as it was the day it happened.

Q. I appreciate your situation, Mr. James. Mr. James, before the second occasion, was Exhibit 3 or a copy thereof called to your attention?

A. After my first wearing of the armband, and before December 12th, this came to my attention, correct. It was presented at a faculty meeting in which the building principal, Mr. Pillard, said it was very unfortunate it hadn't reached the school when it should have. The date on this is November 3rd, and it didn't reach the school and didn't get addressed to the faculty until after the November 14th moratorium, and he read it to the faculty at a faculty meeting.

Q. Before the second moratorium date?

A. That is correct.

Q. Was it discussed at the faculty meeting?

A. There might have been very brief discussion, I don't recall any real discussion. I think maybe Mr. Pillard made some policy statements regarding the meaning of the letter.

Q. This letter is from whose office?

A. Herbert F. Johnston, Deputy Commissioner for elementary and secondary education.

Q. Located where?

A. Albany, New York.

Q. Addressed to whom?

A. School District Administrators.

Q. And the subject was what?

A. The position of the Education Department with respect to days of special significance.

Q. And to shorten the issue, would you read -- excuse me -- if you would care to, would you read the last line on the first page and continue on, sir?

A. "If it should be decided to carry on activities related to the special significance of the day, we would recommend that consideration be given to the following factors. If it should be decided to carry on the activities related to the special significance of the day."

Q. You are repeating yourself?

A. Right. I think it's an important introductory statement, and that is why I am repeating. "One, appropriate educational activity should be carefully planned so as not to interfere with the educational program of the school. Two, special educational activities should supplement rather than replace normal classroom instruction."

Q. What is number three and four?

A. "Three, a school posture should be neutral and objective. Administrators and staff members should avoid taking

positions on controversial matters which may reflect on the objectivity of the school. Four, if controversial statements are to be made by others, effort should be made to assure that all sides of the question are given appropriate attention. Please feel free to call us for further amplification or assistance."

Q. Signed by Mr. Johnston?

A. Right.

Q. Thank you, sir. Now, did you feel that Mr. Brown was bound by this letter?

A. No. I felt that as administrator he had a right to ask questions, as lots of administrators did. My wife called Mr. Johnston's office and asked for a meaning of the letter, an interpretation of the letter, and the office replied that, oh, no, that is not --

Q. Tell us whether you felt Mr. Brown was bound by this letter from the Department of Education?

A. I don't know how to interpret --

THE COURT: Mr. James, I am letting you answer, don't quarrel with Mr. Treinin. You answer.

THE WITNESS: Okay.

THE COURT: Let him answer.

MR. TREININ: Okay.

THE WITNESS: I just felt it was important that the

city schools had had extreme demonstrations--

BY MR. TREININ:

Q. You mean New York City schools?

A. Yes, primarily, and because of that the students that had pro-war and pro-administration statements to make were not being given a fair chance, and that was the impetus that led to the letter. That was expressed to my wife over the phone. I am sure Mr. Brown would feel responsible for the letter, yes.

Q. And did you feel that Mr. Pillard was bound by this statement from Albany?

A. I don't mean to quibble with words but I would rather use the word "responsible" than "bound by". The last sentence is something about questions regarding these four stipulations, they may call and ask about the interpretation of the meaning. It implies, of course, that the school can have a day of recognition for peace -- or for the war issue, I'm sorry.

Q. Did you feel that the teachers were bound by this memo?

A. I think I understood what the memo was doing, so I didn't think it applied -- as a result of our telephone call -- that it applied. It wouldn't have affected my conscience if it had.

Q. In other words, regardless of the memo, you felt you had

the right to wear the armband?

A. Right. I thought I understood the contitutional issue better than the letter did.

Q. You put your judgment at a higher level than the judgment of the Deputy Commissioner of Eduction?

A. Those points are considerably more open --

THE COURT: Mr. Treinin, you can continue on with the cross examination, but maybe I am missing your point. Maybe you need to develop this to develop something further, but isn't this --

MR. TREININ: I am developing --

THE COURT: The questions you are asking, they have been decided, have they not, in this case?

MR. TREININ: No. I'm putting this on the basis of a foundation for my expert testimony, your Honor.

MR. NEUBORNE: Your Honor, I don't want to take up time in argument, but it is our position, of course, the legal effect of this memo, the legal effect of all this material that was before the Second Circuit, and in Commissioner Nyquist's opinion and in his amicus briefs in the Second Circuit.

THE COURT: Very well. The other thing is, Mr. Treinin, I don't know whether you have to ask -- if this is part of your expert's view, I don't know whether you need Mr. James' view on it or not.

MR. TREININ: I just want to show that --

THE COURT: I'm trying to understand and that is why I asked the question.

MR. TREININ: Thank you, sir.

BY MR. TREININ:

Q. Now, after the second occasion was there some communication between you and the Board as to a meeting?

A. I requested the possibility of a meeting with the Board, yes.

Q. Was such a meeting arranged?

A. The Board responded and said that they were willing to meet with me and that -- I don't know whether the proposed date was in the letter -- but there was a positive response, they said yes, we can hear you.

Q. And was that consistent again with the possible settlement of the differences between you and the Board?

A. It would be hard for me to say yes for two extremely strong reasons. Firstly, they expressed it wouldn't be a hearing, and that is why -- as I am sure you are getting ready to

bring up -- I changed my mind and decided not to go to a place in which my primary function would have been to have a chance to say something and that's all. Of course, the public hearing, which was later held by the Board, just confirmed and solidified my anticipation, because there was not an open audience, open response to the proposals at that meeting either.

Q. Mr. James, did you ever say to the Board that you wanted certain conditions attached to a meeting with them?

A. I asked the Board -- I don't remember the wording I used, I'm sure you have the letter -- but I was aware of the statement that the Board made or that had been made at the Board meeting, that it would in no way be a hearing, and that was, you know, the germ of my anxiety that led me to decide after talking -- I'm trying to remember who I talked to, I'm sure that must be in some previous testimony --

Q. Mr. Freeman?

A. It may have been Mr. Freeman, and the advice was don't go to a situation in which you don't have a good basis for a hearing, in which you would be represented and in which there would be dialogue, rather than just a chance to speak your piece, so to speak.

Q. After you discussed it with Mr. Freeman, did you go back to the Board and say you would appreciate a hearing where

you could be represented and have this dialogue?

A. There had already been -- the statement already had been made that it wouldn't be a hearing. There was a -- you have minutes there of a Board meeting in which it was specified that this wouldn't be a hearing.

Q. Did you ask them to change their minds?

A. Of course not.

Q. Why not?

A. Because the Board had supported -- for three good reasons; number one, the Board had supported the original suspension and, secondly, in my many years as a minister I had enough knowledge of life and experience, and Board members after a long hard Board meeting like that, there was no place within the realm of human logic which would lead me to think there would be a radical change in sympathies. So there would be no functional reason for hearing a -- in a legitimate hearing -- Something they had made up their minds about, and in a situation in which they had never asked me in the beginning what happened, and had supported, you know, a travesty of my rights.

Q. Now, they had asked you --

A. They said they would be glad to let me come and speak. They would have been glad to let anyone come and speak. They would have been willing to accept anyone as long as

the person had no power or leverage.

Q. You don't know how the Board would have reacted, do you? You didn't give them a chance, did you?

A. I believe I did.

Q. By refusing to meet with them, is that your definition of giving them a chance?

A. They already had their chance.

Q. When?

A. When my rights were taken away and they supported that.

Q. When you --

THE COURT: Excuse me, Mr. Treinin. Unless I completely missed your point here, I think that whether or not Mr. James went to the meeting or didn't go to the meeting, that is all in the past.

MR. TREININ: Yes, but it showed that there was an attempt to conciliate and to meet and talk this thing out, and it was refused by Mr. James.

THE WITNESS: It doesn't show I made the request for the meeting.

THE COURT: Mr. James, just a minute. If I am not mistaken, this was all before Mr. Nyquist and all in the previous motion before Judge Burke and before the Second

Circuit?

MR. TREININ: That is right.

THE COURT: It may show his attitude after wearing the armband. Continue, Mr. Treinin.

(Thereupon a document was marked Defendant's Exhibit 4 for identification.)

BY MR. TREININ:

Q. Now, we had discussed the joint code of ethics. Are you familiar with Exhibit 4, Mr. James?

A. This code of ethics, I would -- no. I was asked to serve as chairman of the committee on ethics in the first school in which I taught. I know that National Educational Association Teachers Code of Ethics, this is probably similar. I'm aware of the tone of it, I'm sure.

Q. Do you remember we discussed it at the time of the examination before trial?

A. Yes, I do.

Q. Were you aware of the statement in that joint code that it is the prerogative of the Board to determine the final policy of the school?

A. I'm aware of it now.

Q. And that --

MR. NEUBORNE: For the record, I really must interpose an objection. This is the very code that was discussed in the Second Circuit and discussed by Commissioner Nyquist.

THE COURT: Is this the deposition now in evidence?

MR. TREININ: Yes.

THE COURT: Number one, he said he is not familiar with this code, he's familiar with others.

MR. TREININ: I'm willing to rest on the deposition in that regard, your Honor.

THE COURT: If there is some important questions that you want to bring out, do so. I don't mean to cut you off.

BY MR. TREININ:

Q. Are you familiar with the paragraph in the joint code which reads as follows: "The teacher and the School Board recognize their obligation to develop growing appreciation and understanding of the principals of democracy. They refrain from using the school to promote personal views on religion, race or partisan politics."?

A. Yes, I'm familiar with that.

Q. Do you agree with it?

A. Yes.

Q. You told us that you recognized the fact that the wearing

of the armband had political implications to some of your students, did you not?

THE COURT: I have heard the prior testimony. I have heard the statement of the code, and Mr. James' response. As far as what went on before, about what the political implications were, we have the answer to that. Next question, please.

BY MR. TREININ:

Q. Now, you wanted the armband to have an impact on the children?

THE COURT: You have asked that question a number of ways on different occasions. He explained it at different times. I think the overall conclusion that the Court would reach is that yes, he did, keeping in mind his religious beliefs.

MR. TREININ: May I ask two more questions?

THE COURT: Mr. Treinin, you may continue. I'm not saying that to cut you off. It seems that that has already been asked.

(Thereupon documents were marked Defendants' Exhibits 5 and 6 for

identification.)

THE COURT: Are you going to nave any additional witnesses tomorrow, Mr. Neuborne?

MR. NEUBORNE: No, your Honor. The only expert the plaintiff will call, his deposition has already been taken pursuant to Rule 32, with Mr. Treinin present, and subject to -- I think his testimony isn't relevant, but if the Court feels the testimony is necessary, I will submit that as my rebuttal case.

THE COURT: Mr. Treinin, do you have some additional witnesses tomorrow?

MR. TREININ: Oh, yes.

THE COURT: Mr. James will be back tomorrow?

MR. TREININ: Yes. I was hoping I could have a chance to go into the question of damage tomorrow.

THE COURT: Yes, surely. Why don't you ask about these papers?

BY MR. TREININ:

Q. Before the Commissioner did you submit a reply to the School Board's answer, which I now show you as Exhibit 5

for identification?

A. Yes, I guess so. It seems to be obvious.

Q. And did you in that Paragraph 10 --

MR. NEUBORNE: May I have a voir dire on that?

THE COURT: Yes.

MR. NEUBORNE: Before he begins to read from it?

THE COURT: Yes.

PRELIMINARY EXAMINATION BY MR. NEUBORNE:

Q. Will you review the reply for a minute and see whether you signed it? Is that your signature at the foot of that document?

A. No.

Q. Is that the signature of the attorney who represented you?

A. Yes. It is not my signature.

Q. Was this paper drawn by your attorney?

A. That is right.

THE COURT: I will permit him to read the paragraph. I will take it all into consideration.

MR. NEUBORNE: Thank you.

BY MR. TREININ:

Q. "Paragraph 10: The Petitioner denies"-- you were the petitioner in that case, correct?

A. Yes.

Q. "--denies that the Petitioner was dismissed in accordance with Section 3013 of the Education Law, and alleges that any dismissal of the Petitioner was in violation of the Constitution of the United States and of the Education Law of the State of New York; denies that the issues raised by the Petitioner are or ever were moot and academic, and affirmatively alleges that the Petitioner -- " I'm sorry, may I withdraw that? I wanted to read from Paragraph 12. I beg the Court's indulgence.

MR. NEUBORNE: Don't you want to read that paragraph?

MR. TREININ: If you wish.

BY MR. TREININ:

Q. "Alleges the Petitioner and each one of his colleagues, and each and every one of his students is now suffering, and from the moment of the barring of Petitioner from Respondent's school has suffered and continues to suffer irreparable injury in that the academic freedom and the rights of expression and free association guarantee by the Constitution of the United States and the State of New York were denied to them and each of them." And the Commissioner disagreed with you in that respect, is that right?

A. Yes.

Q. And in Paragraph 12: "That Petitioner admits and alleges that the wearing of the armband by Petitioner was a symbol of an opinion by Petitioner, and was intended to convey, to all who cared to observe, the opinion and association of Petitioner with respect to the acts of the Administration of the Government of the United States and its conduct of the war in Viet Nam, but denies each and every allegation in Paragraph 12 of the answer, including but not limited to the allegation that the wearing of the armband was partisan politics," and so forth. That was written in your behalf and filed in papers in your case?

A. Yes.

THE COURT: It is clear it was.

BY MR. TREININ:

Q. Also whether or not you submitted an affidavit in this action -- well, it was not signed by you, it was signed by the notary on the blank date of September 1971.

MR. NEUBORNE: May I see it for a moment?

MR. TREININ: It is part of the papers in the record, Mr. Neuborne.

THE COURT: Is this before --

MR. TREININ: Before this Court.

THE COURT: -- before the Commissioner?

MR. TREININ: Not before the Commissioner, but before this Court.

MR. NEUBORNE: This is the affidavit Mr. James made to the District Court.

THE COURT: Do you want to read it?

MR. TREININ: No, just one slight bit.

THE COURT: You want to read one part, okay.

BY MR. TREININ:

Q. From Paragraph 4: "As a pacifist and a Quaker, my concern over the loss of life in Viet Nam was not traceable merely to a political disagreement with our nation's policy, but stemmed from my religious aversion to war in any form." Did you submit that in this action?

A. I didn't submit it. I don't understand legal language, Mr. Treinin.

Q. Wasn't this signed by you in the original action?

THE COURT: All right. It is clearly admitted it was signed by him, Mr. Treinin, and I will consider that as part of the cross examination.

MR. TREININ: May I offer both exhibits in evidence?

THE COURT: If that is part of the affidavit in this case, it is here, it may be referred to.

MR. TREININ: And the other one before the Commissioner, may I offer that?

THE COURT: That may be marked in evidence.

(Thereupon Defendants' Exhibit 5, previously marked for identification, was received and marked in evidence.)

MR. NEUBORNE: I don't want to quibble about the business before the Commissioner, as long as the Court understands that was material submitted by an attorney, signed by an attorney, which Mr. James didn't necessarily read or have any opportunity --

THE COURT: I understand. We will take a break now until tomorrow, Mr. Treinin. I know you are here from some distance. I don't know how long you will be tomorrow. Now, this other man that you talked about, you said he can't be here tomorrow?

MR. TREININ: I hope to have him here tomorrow night, he will be ready for testimony the first thing Thursday morning.

THE COURT: I have to plan -- I've promised some people time on Thursday -- but how long

will he be, do you expect?

MR. TREININ: My best estimate is perhaps not over an hour.

THE COURT: All right. As far as your witnesses tomorrow, how long do you expect they will be?

MR. TREININ: Not more than an hour and a half, maybe two.

THE COURT: All right.

MR. TREININ: That is my man from the Education Department. Now, are we going to read into the record Dr. Clark's testimony?

MR. NEUBORNE: My position is going to be, with respect to the expert witnesses, that I would like to hear them before there is even a question of admissibility or relevance.

MR. TREININ: We have a question as to the burden of proof, upon which our Court of Appeals has spoken very recently, which I would like to submit to his Honor.

MR. NEUBORNE: Mr. Treinin, do you have any doubt that the burden of proof lies on you, under the James decision, to establish justification.

THE COURT: Which Court of Appeals?

MR. TREININ: The Court of Appeals of the State of New York and citing the Roth case, by the way.

THE COURT: I will consider it. I would think that we have law made in this particular case, tailor made in this case, and it would seem here from the reading of that decision that the burden is upon the Board.

MR. TREININ: Since then, of course, Roth has been decided, and within the last two weeks the Court of Appeals of our state has had a similar case before it.

THE COURT: You get the cases out.

MR. TREININ: I have it.

THE COURT: I will consider it. Now, if it would help you, we can begin tomorrow at 9:30.

MR. TREININ: Anything your Honor says.

MR. NEUBORNE: Your Honor, we are finished. All we have to do is hand up one deposition by stipulation, Mr. Pillard had to go to California.

MR. TREININ: I have additional cross examination on the plaintiff.

THE COURT: 9:30.

MR. TREININ: Thank you, your Honor.

(Thereupon the Court was in recess.)

* * * * * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

CHARLES JAMES,

Plaintiff,

-v-

CIVIL ACTION
NO. 1971-164

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, DISTRICT PRINCIPAL CENTRAL DISTRICT NO. 1; CARL PILLARD, PRINCIPAL ADDISON HIGH SCHOOL; and ROBERT ANDREWS, PRESIDENT OF THE BOARD OF TRUSTEES OF CENTRAL DISTRICT NO. 1,

Defendants,

-and-

CHARLES JAMES,

Plaintiff,

-v-

EDWARD J. BROWN, et al.,

CIVIL ACTION
NO. 1974-175

Defendants.

* *

Proceedings held before the Hon. John T. Curtin, United States District Judge, in Part II, United States Court House, Buffalo, New York, resuming on July 10, 1974.

APPEARANCES: BURT NEUBORNE, Esq., Attorney for the Plaintiff.

HARRY TREININ, Esq., Attorney for Defendants.

VOL. II

(PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:35 a.m.)

THE COURT: Good morning, gentlemen.

MR. TREININ: Good morning, your Honor.

MR. NEUBORNE: Good morning, sir.

THE COURT: This morning we are all saddened to note the death of former Chief Justice Earl Warren. I think to those of us who practice law, certainly he was an exemplar of what a judge ought to be, a man who approached problems with reason and compassion and patience, and always looked for a solution to the problems by continuing to have thoughtful discourse with his fellow justices.

At the same time, I must add, as more of a personal note, that yesterday we here in the Buffalo area were informed of the death of State Supreme Court Justice Thomas Ryan who, as far as this Court is concerned, has been around for many, many years. He, in a local and a particular way, it appeared to me, seemed to stand for the principles that Justice Warren did; before being a judge, he practiced law in

the area and was held in high regard by all of the attorneys who practiced before him. Before going into the State Service, he served as the Commissioner here for a time in this court, and his cooperation with the Federal court system was always one of understanding and dedication to the ideals which Justice Warren exemplified to such a high degree on a national scale.

So that this Court is saddened by the passing on of both of these excellent jurists, and we hope that the traditions and the principles that they stood for will be carried on by others.

At this time are you going to continue with Mr. James' cross examination?

MR. NEUBORNE: I believe so, your Honor.

MR. TREININ: Finish up on that first.

THE COURT: Fine.

MR. TREININ: With reference to the damages.

C H A R L E S J A M E S, called as a witness on behalf of the plaintiff, and having previously duly affirmed, resumed and testified further as follows:

CROSS EXAMINATION BY MR. TREININ: (Continued)

Q. Mr. James, you applied to various school districts for employment after your suspension by the defendant district?

A. That is correct.

Q. And to how many school districts did you apply, approximately?

A. Probably ten.

Q. And did you apply on the college level at all?

A. Yes.

Q. Did you apply to the Keuka College which is in our vicinity?

A. No.

Q. Eisenhower College?

A. No.

Q. Hobart College?

A. No.

Q. What used to be the female counterpart of Hobart, is that Smith?

A. I don't know. I applied to the schools that I read advertisements of for employment.

Q. Did you apply to Smith College?

A. No.

Q. Cornell?

A. I can't remember whether I applied to Cornell or not.

Q. Those colleges are all in our vicinity, are they not?

A. Yes. I responded to advertisements.

Q. You looked for the advertisements, you didn't actively solicit employment in other institutions in our area?

A. I applied to a number of colleges, but I didn't select my college employment on the basis of location. I selected my college applications -- in that sheaf of letters you will see many of those applications, and in many cases there were also interviews and long distance telephone calls, which don't show up in the letters.

Q. Did you apply for employment as an English teacher in the high schools on the basis of location?

A. At the beginning, yes.

Q. Why did you use one standard in applying to colleges and another standard in applying to high schools?

A. That is -- I think that is obvious.

Q. Tell us why?

A. Because to stay within the field that I was accustomed to and to stay in the area on the high school level is quite simple. Colleges, I sought out people I knew in places like Haverford --

Q. Is that in Pennsylvania?

A. Yes, or at schools that I had been associated with or knew people who were employed there because, as you know, we have been through a period in which teachers were in a dearth, now we are in the opposite, where they are doing away with the teaching positions and reducing the size of English departments, so one wastes a lot of time if they just make out random applications, plus the fact that when we make out a resume, you have to go to the public library and pay ten cents a page for all the covering material and letters of recommendation. The average resume costs between $3 and $4 to duplicate the material.

Q. So that you theoretically were willing to travel for a college job but not for an English high school job, is that correct?

A. I don't know --

THE COURT: Excuse me, Mr. Treinin, before you go further. Mr. James, will you explain to the Court -- I know that you have degrees and certification, but do you have any advanced degrees, do you have a Masters degree?

THE WITNESS: Yes. I also had eighty-five hours beyond my Bachelors before I ever sought

to pull anything together for my Masters, and I had a few friends who knew that I did well in philosophy, as well as English, and I tried to use that as a tool to get in the philosophy positions, as well as English positions.

THE COURT: You say you have eighty-five hours beyond the regular college studies, what field is that in?

THE WITNESS: Primarily English, philosophy and theology.

THE COURT: I know you related the schools that you attended before, but can you tell us what schools did you obtain or carry on your advanced studies?

THE WITNESS: The graduate work was done at the State University College at Oneonta, which is part of the State University of New York, and at Colgate Rochester Divinity School, and at Elmira College. That is all I can think of.

THE COURT: You said before you pulled it all together, did you eventually get an advanced degree?

THE WITNESS: I got a Masters degree.

THE COURT: In what field was that?

THE WITNESS: In English, English education.

THE COURT: Did you ever proceed further to get a doctorate in any field?

THE WITNESS: No.

THE COURT: Go ahead, Mr. Treinin.

BY MR. TREININ:

Q. Now, under the circumstances, with your qualifications along those lines, why didn't you apply to the colleges that I have named, which are in our locality?

A. The answer isn't any different than it was before, that I only had so much time, twenty-four hours a day, and I applied to those places that were asking for help, and to those places that I had some contact with friends.

Q. Now, on June 22nd or 23rd of a few years ago, our area was struck by a horrible catastrophe, which is now called X, the flood, and as a result of that, there was a giant rehabilitation program by the Government, and hundreds of jobs were open; did you apply for any of those jobs?

A. I would have to look at the record of my employment. I did voluntary work at that time. I abhorred the idea of people running out, making $10 an hour while people were suffering, and Neva and I closed the house and went down to Broadway Junior High School in Elmira and worked

in the cafeteria nearly around the clock for the first few days, until our energies were gone.

Q. Now --

A. Let me finish, Mr. Treinin.

Q. Yes.

A. When it got so that the flood situation was under control in Elmira, we began to have too many chiefs and not enough braves, and then we went to Corning and did voluntary work in the school up above Sterling Street there.

Q. After the dire emergency ended, there were many Governmental programs set in motion, requiring the employment of experienced and able people, did you apply for any of those positions?

A. What programs? I want to know specific examples.

Q. Such as the small business program, such as the expanded welfare programs.

A. I know there were a lot of people seeking construction work after the flood --

THE COURT: Now, excuse me. Mr. Treinin and Mr. Neuborne, in some of the cases I have here in Federal court in some areas of the law, for example, a man is injured in an automobile accident, in which the Court follows the State rules on mitigation,

the person is obliged to attempt to mitigate damages. In other areas, for example, under the Federal Employers Liability Act, there are instances, without dealing with all of the exceptions and so forth, where a man is not obliged. To give you one example, if he is fired by a railroad, he is not obliged to mitigate his damages, and the railroad must pay him back all lost wages. Now, is there such an obligation under the law here?

MR. NEUBORNE: My understanding is in 1983 cases there is no obligation to mitigate. However, if any sums are earned, they are to be applied in mitigation. However, for the purposes of this hearing, we introduced thirty some odd letters of applications that Mr. James put in. He would meet the mitigation standard. He isn't obliged to meet the mitigation standard, but for the purposes of the hearing we introduced evidence that in fact he bent over backwards to meet the mitigation standards.

THE COURT: The other thing, Mr. Treinin, you are

talking about a lot of colleges. I think that it would be your burden to show that there were openings because I think, not that it is a subject of proof, but in many areas of teaching it is difficult to get positions. A man with a Masters degree only may have a great deal of difficulty in getting hired at Cornell or Hobart or other schools. He may be able to get a position at a community college and he may not. So that I will permit the cross examination, but I wanted you to understand how I look at the law and how I look at the fact position which may be of aid to you in conducting your inquiry.

MR. NEUBORNE: If you like, this is Plaintiff's Exhibit 4, which is the employment letters. You might find them helpful.

BY MR. TREININ:

Q. Now, yesterday, do you remember you were asked to mark Exhibit 6, Mr. James?

A. Right.

Q. Now, you made certain earnings; for instance, the first one at Corning Community College, you have it marked

night and summer school only?

A. That is correct.

Q. Do you remember how much you earned as a night school teacher and how much you earned as a summer school teacher? The total is $3,075.

A. Night and summer -- no, if you have the figures, I would be glad -- oh, I have $3,075, I have that figure. It is not the same thing. It is a rough copy.

MR. NEUBORNE: Your Honor, I think that there may be a misunderstanding between the witness and Mr. Treinin.

MR. TREININ: I think there is.

MR. NEUBORNE: I didn't understand the question either.

THE WITNESS: Am I supposed to answer?

MR. NEUBORNE: Mr. Treinin wants you to break down the $3,075, as to how much you earned in connection with summer school and how much you earned in connection with night school.

THE WITNESS: I wouldn't have the slightest idea of a breakdown.

BY MR. TREININ:

Q. The night school was conducted in hours that you wouldn't be working under any circumstances at Addison?

A. That is correct.

Q. However, when did the summer school start?

A. Well, at Corning Community College they have a mini session and then they have two summer sessions, and like now, I have just finished teaching a special course for Head Start Teachers.

Q. Let's talk about 1970.

A. I'm just saying it was a Maverick course they set up so that I could teach it.

Q. You set down in your statement, Exhibit 6, that it started in June of 1970, is that correct?

THE COURT: Mr. James, rather than giving other examples, can you answer the question which is asked? Mr. Treinin is asking about 1970. Try to answer. If you can't answer --

THE WITNESS: Well, the problem is that the Continuing Education Department has both a basic stipulated program -- a program which opens with a mini session, which is a matter of aboutthree weeks, then they have two approximately six to eight week sessions, and if the paper says it started in June, then probably the first class started about the last week in June.

BY MR. TREININ:

Q. If I received a note from the secretary of the Division of Continuing Education that it started June 10, 1970, would you accept that?

A. Sure.

Q. All right. Are you aware of the fact that in June of 1970, the Addison school term ended on June 19th?

A. If you say it did, I am sure it did.

Q. So that if you were working you couldn't have accepted the Corning Community job?

A. That is true.

Q. Likewise, further down the list, in 1971 you worked for Corning Community College between January 1971 and December 1971, night and summer school only it says.

A. Mine doesn't read the same way. This is just a scratch copy, I would have to see that to know what you are talking about.

Q. Now, in that case, can you tell us how the $3,465 is divided between earnings for night school and summer school employment?

A. No. I'm sure the college could supply the information, but I don't remember.

Q. Here is a copy.

A. Okay.

teach only night school at Corning Community?

A. No, there were some -- this should show it, you got a check copy, I haven't. Under 1970 you have $660 --

Q. We are not talking about that at all. We are talking about the 1971 employment at Corning Community College for which you show earnings of $3,465.

A. Okay, I'm with you. Apparently not.

Q. Are you aware that the summer session at Corning Community College started on June 8th in 1971?

A. I am now, yes.

Q. And that the Addison semester was completed on June 21st to June 24th for the Regents exams, so if you worked at Addison you couldn't have taken that job either, is that right?

A. That is true.

Q. Now, turning the page, Mr. James, on the earnings in 1972 at Corning Community College -- are you having some difficulty?

A. No, I'm okay.

Q. This also shows the earnings were for night and summer school, can you allocate what was earned for each job?

A. No, I would have to go back through the contracts.

Q. Did you work in summer school when your employment ended in June of 1972?

A. Ask that question again. I'm not sure --

Q. Your exhibit shows that your work for the college was completed in June of '72. Are you sure you worked in summer school that year?

A. I would have to look at my contracts. I don't memorize when I work. I wait for them to say they want me --

Q. In any event, would you accept the fact that the Corning Community summer session started on June 6, 1972?

A. Sure.

Q. And that the Addison School System closed its semester on June 23, 1972?

A. Yes.

Q. Now, you mentioned that there was considerable unemployment in the scholastic field, and certainly as far as the English teachers are concerned?

A. Definitely, yes.

Q. That was true in 1970?

A. I'm sure it was tightening up by then.

Q. So there is a surplus countrywide in the English department, as far as the supply of teachers is concerned?

A. Yes, I would think so.

Q. As a matter of fact, the situation is aggravated by the reverse trend in our population growth?

A. Yes, true.

Q. Now, those factors certainly contributed to the situation that you could not find a job during this period, is that

true?

MR. NEUBORNE: Your Honor, I don't wish to curtail Mr. Treinin's cross examination, but under no view of the law of mitigation of damages could that be a relevant criteria.

THE COURT: Mr. Treinin, you are asking him to be an expert on economics and education and --

MR. TREININ: I will withdraw the question, your Honor. That is all I have, sir. Thank you.

THE COURT: Mr. Neuborne?

MR. NEUBORNE: Very brief redirect, your Honor.

REDIRECT EXAMINATION BY MR. NEUBORNE:

Q. Just a few questions, Mr. James. You were attempting to clarify, I think, for Mr. Treinin the structure of the Corning Community College summer session. Is it a single session that runs from the opening to the close or is it divided into segments?

A. Divided into segments.

Q. Would you explain what the segments are?

A. They have a breakdown of sessions, it varies; usually the sessions are either six or eight weeks long in the summer school, so that somebody who is working can work half the

summer at that profession or their job and come in the second half of the summer or vice versa.

Q. What about the mini session you mentioned. When does that start?

A. I got thinking before about that, and I'm not sure whether the mini session is at the beginning of the summer or is something they squeeze in at Christmastime. No, they have a mini session in the summer, I'm sure they do.

Q. And that mini session begins on the date that Mr. -- well, strike that. Just one other question for you. Mr. Treinin mentioned the series of alternatives that Mr. Brown put to you on the last -- on December 12th, on that last conversation you had with him, did everyone of those alternatives require you to remove the armband that day?

A. There was no option, as far as wearing the armband was concerned.

Q. He never suggested to you that you could continue to wear the armband and litigate the matter or find out the legality of the situation?

A. No.

MR. NEUBORNE: I have no further questions.

RECROSS EXAMINATION BY MR. TREININ:

Q. Did you make any counter-proposals to Mr. Brown?

A. You mean the second time?

Q. Yes.

A. No.

MR. TREININ: That is all.

MR. NEUBORNE: That is all, your Honor.

THE COURT: All right. Thank you, Mr. James.

(Witness excused.)

THE COURT: All right. Do you have anything else in the Plaintiff's case? Are there any exhibits or records of other proceedings, anything like that?

MR. NEUBORNE: I don't think so. It wouldn't be proper for me to introduce the Second Circuit opinion?

THE COURT: That is part of the record.

MR. NEUBORNE: I can't think of anything. The only other item the plaintiff would offer at this time, Mr. Pillard, one of the named defendants in this case, had to go to California on personal business, and both Mr. Treinin and I agreed, if it was all

right with the Court, that we would use Mr. Pillard's deposition in lieu of his testimony. I would have called him pursuant to Rule 43 if he were here. At this time, with the Court's permission, I would like to hand up his deposition, and I understand with Mr. Treinin's consent.

THE COURT: Do you agree?

MR. TREININ: Yes, that was our agreement, your Honor.

THE COURT: Mark it. It will be considered as part of the record.

(Thereupon Plaintiff's Exhibit 8, previously marked for identification, was received and marked in evidence.)

THE COURT: I understand you have closed?

MR. TREININ: Yes, sir. At this time the Plaintiff rests with, of course, the understanding that at the appropriate time rebuttal witnesses may be called.

THE COURT: Mr. Treinin, are you ready to proceed?

MR. TREININ: Yes. May I, for the record, make a

motion to dismiss on the grounds that the plaintiff has failed to prove the complaint--the allegations of his complaint or the cause of action alleged in the complaint or any cause of action, and I ask it be dismissed on those grounds.

THE COURT: I will deny your motion.

MR. NEUBORNE: I remember there is one motion I should make at the close of my case, that is, that the damage clause in the complaint requesting damages of $25,000, under my calculations now, plaintiff's calculations, of course, the back wages plus the undifferentiated compensatory damages which are in the case now would, in the plaintiff's opinion, justify recovery in excess of $25,000 and, accordingly, under Rule 50 and the practice in the Second Circuit, as I understand it, the plaintiff requests at the end of the plaintiff's case to conform the pleadings to the proof, and to increase the damage request from $25,000 to $35,000, and at the appropriate time, if the Court wishes, I will submit legal memorandum on the point,

I understand that to be the normal practice.

MR. TREININ: May I enter my objection?

THE COURT: You object. I grant your motion to increase the addendum clause, that is permitted. So ordered.

E D W A R D J. B R O W N, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. TREININ:

Q. Mr. Brown, you are one of the defendants in this action?

A. Yes, I am.

Q. And where do you reside?

A. I reside in Addison, New York.

Q. And will you kindly give us your educational background?

A. I have a Bachelors Degree from Skidmore College; a Masters Degree from Syracuse University, and I have done additional graduate work at both Syracuse University and the State University College at Albany.

Q. Will you give us the nature of your educational employment during your career?

A. During my career I spent two years as a high school mathematics teacher, approximately four years as a vice-

principal, five years as a high school principal, and going on ten years as a district principal.

Q. When were you first employed at Addison?

A. It would be August 1955.

Q. That makes it about nineteen years ago?

A. That is correct.

Q. In what capacity?

A. I was hired as a vice-principal.

Q. And how long were you a vice-principal?

A. Approximately four years.

Q. After that what position did you attain?

A. High school principal.

Q. How long did you have that position?

A. Five years.

Q. And after that what position did you attain?

A. District principal.

Q. And when were you appointed as district principal?

A. This will be -- I will be completing my tenth year as district principal.

Q. You have been in Addison a total of nineteen years?

A. That is correct.

Q. This district has how many faculty?

A. One hundred.

Q. Approximately?

A. Approximately.

Q. And how many students?
A. Approximately nineteen hundred.
Q. Generally, what is the population range of the district that the school covers?
A. I would say in the neighborhood of forty-five hundred to five thousand.
Q. Now, to get ourselves to November 14, 1969, when was your attention first called to the so-called armband incident?
A. It was in the early hours of the morning, sometime after 8:00 o'clock.
Q. By whom?
A. It was called to my attention by Mr. Pillard, the high school principal.
Q. And what did Mr. Pillard say to you?
A. He reported to me that Mr. James had appeared at the school wearing an armband, and asked what he should do, if anything.
Q. And what did you tell him?
A. I asked him to -- told him to call him to the office and to ask him to remove it.
Q. When you say "call him to the office", you mean Mr. Pillard's office?
A. That is correct.
Q. And to your knowledge did that happen?

A. Yes.
Q. And what was the next you knew about this situation?
A. Mr. Pillard reported to me that Mr. James had refused to remove the armband and that he would be reporting to my office.
Q. Mr. James would be reporting?
A. Mr. James would be reporting.
Q. About what time did Mr. James come to your office, your best recollection?
A. We have had some trouble with time, and it is in the record, and I --
Q. Do you have any memos that might refresh your recollection?
A. Yes, I do. I'm not sure that it's in this.
MR. NEUBORNE: Could we mark that for identification?
THE WITNESS: I'm not at all sure it's in here. No, I'm sorry, the time isn't here.
MR. NEUBORNE: I would like whatever he looked at marked for identification.
THE COURT: Mark it just for identification. By the way, what is that, Mr. Brown, that you had there, the folder?
THE WITNESS: This is a folder with some materials which I felt were pertinent.
THE COURT: Mr. Walsh, would you mark that just for identification?

(Thereupon folder referred to was marked Defendant's Exhibit 7 for identification.)

THE COURT: You are searching for the time of day?

MR. TREININ: We wanted something more accurate. I don't think it is that important.

THE COURT: It wouldn't seem to be to me. The first thing in the morning, I suppose?

THE WITNESS: I have trouble, you know. There has been discussions of these times and each person has a little different interpretation.

MR. TREININ: It isn't that essential.

THE COURT: Early in the morning?

THE WITNESS: Right.

BY MR. TREININ:

Q. Finally Mr. James came to your office?

A. Yes.

Q. Was there anyone else present?

A. No.

Q. And would you tell us what took place?

A. Mr. James and I discussed the wearing of the armband, his

reasons, and my attitude toward the appropriateness of wearing the armband.

Q. What did he say as to his reason for wearing the armband?

A. He indicated that it was to demonstrate his opposition to killing. He went into some detail explaining his attendance at a Quaker Meeting, this type of background, to his wearing the armband.

Q. And did you explain your attitude?

A. Yes, I did.

Q. What was the explanation that you gave?

A. I pointed out that I felt that the impact of his wearing an armband had political connotations, and I felt that his wearing this was contrary to the teachers code of ethics, I felt that it would be disruptive to the educational process, and it might lead to further disruption and divisiveness among the teachers.

Q. What was his reply to that?

A. Well, he felt that -- he explained that he had not discussed this with the pupils, he did not agree it was unethical behavior.

Q. Now, in taking the attitude you did, what did you base it on?

A. Well, I based it on the professional code of ethics and my understanding of the policies of the State Education Department in regard to the treatment of controversial

issues in the school.

Q. Now, was your attitude based in any part on whether you agreed or disagreed with Mr. James' philosophy?

A. No, it wasn't.

Q. Was your attitude based solely on your role as the principal of the high school?

A. Yes, it was.

Q. And on your role as the man in charge of the education of the children in that high school?

A. Yes.

Q. And were you prompted only by those considerations?

A. Yes.

Q. And the question of agreeing or disagreeing with Mr. James' philosophy, did that have any part to do with it?

A. No, it didn't. In fact, I didn't discuss my particular point of view in regard to the moratorium.

Q. How long did this meeting last?

A. In the neighborhood of thirty minutes to forty-five minutes.

Q. Was there any argument between the two of you?

A. No, I feel it was a low key conversation.

Q. Carried out in a gentlemanly manner?

A. I believe so.

Q. Between gentlemen?

A. That is correct.

Q. And you came to a -- you saw there was a disagreement that couldn't be solved?

A. Yes.

Q. And what did you do?

A. Well, I indicated to Mr. James that I felt that I was right in the position that I was taking; however, I would need to seek legal counsel and counsel from the Board of Education; however, for the present that I would have to insist that he remove the armband.

Q. You realized that this was a situation that posed serious problems?

A. That is correct.

Q. And did you indicate to Mr. James that you wanted further advice?

A. Yes, I did. In fact, I explained to Mr. James at the time of suspension that if it turned out that I was incorrect in my interpretation of the policies and the ethics, that his suspension would be with pay.

Q. As a matter of fact, ultimately he was paid for the day, wasn't he?

A. Yes, he was.

Q. Then the next day the Board had a meeting?

A. Yes.

Q. As a result of which the letter that was testified to was sent to Mr. James?

A. Yes.
Q. And Mr. James returned to teaching the next Monday?
A. Yes.
Q. Were matters uneventful until the Monday of the second moratorium?
A. Yes.
Q. Did you ever have occasion to talk to Mr. James about the armband incident in the interim?
A. I did not.
Q. Did he ever approach you?
A. Regarding the armband?
Q. Yes.
A. No.
Q. Did you have any business with him during that time that you recall?
A. I recall no specific incident. I may very well have in the routine of school business had conversation with him, I remember no specifics.
Q. Now, did there come a time when you received a communication, which is marked 2A?
A. Yes.
Q. What is 2A?
A. This is a letter from Thomas S. Davis who was the president of the Addison Teachers Association. The

the Board of Education, Addison Central School.

Q. What does it say?

MR. NEUBORNE: I object, your Honor, it is a hearsay letter not received in the ordinary course of business, written by someone else to someone else, and testified to by a third party.

THE COURT: All right. I will overrule your objection and permit it. Go ahead.

BY MR. TREININ:

Q. Will you read the letter, please?

A. Yes. "At the regular meeting of the Addison Teachers Association on November 18, 1969, there was read from the floor and adopted by a majority vote of those present a resolution supporting the decisions and action of the Board of Education and the Administration of the Addison Central School concerning the unethical behavior of Mr. Charles James on the morning of November 14, 1969. A copy of that resolution is enclosed with this letter. The Board of Education and the Administration are to be congratulated on their early and efficient steps taken in the interest of the community to preserve order and protect the school from the malady which unchecked has immobilized schools of greater fame than Addison."

Q. Accompanying that letter was there Exhibit 2 for identification?

A. Yes.

Q. What is Exhibit 2?

MR. NEUBORNE: I have the same objection, your Honor.

THE COURT: This is what, the proceedings of the Teachers Association?

MR. TREININ: Yes, your Honor.

THE COURT: I will overrule the objection and let it become part of the record.

BY MR. TREININ:

Q. Would you read that?

A. It is a resolution adopted by the Addison Teachers Association, November 18, 1969. Do you want me to read the contents?

Q. Please.

THE COURT: Do you want him to read the whole thing?

MR. TREININ: Unless the Court has any objection.

THE COURT: Is there some particular part you want to have him read?

MR. TREININ: Excuse me.

THE COURT: I was thinking about saving time. I suppose the easiest thing is to let

him read the whole thing. I thought it was several pages.

MR. TREININ: It's only a single page.

BY MR. TREININ:

Q. Read it, Mr. Brown.

A. " Whereas the operation of the public school is regarded as essential to the preservation of liberty and as forming one of the first duties of a democratic government, the place assigned to it in the deliberate judgment of the American people being scarcely second to any, and whereas the implementation of public education has been delegated by the citizenry of each community to elected boards of education and their administrative representatives, be it therefore resolved that the Addison Teachers Association recognizes the Board of Education as the duly elected voice of this community, and the Administration it has chosen as a properly constituted authority to direct education in its schools. It further recognizes the propriety and validity of decisions made safeguarding the school from partisan influences contrary to the basic philosophies of the community, the Board of Education, and the school. Inasmuch as Mr. Charles James, secondary school English teacher, and member of the Addison Teachers Association,

was involved in unethical activity on the morning of November 14, 1969, in the act of wearing a black armband in a public school, which act being an expression of personal political views, and inasmuch as the said Mr. James did on that occasion, and of his own volition, refuse to reply with the request of his administrator to remove his armband before entering his classroom, be it further resolved that the Addison Teachers Association go on record as approving the action of the Addison Central School administrative staff and the Board of Education in their suspension of Mr. James from his teaching position. Copies of this resolution will be sent to the president of the Board of Education, the district principal and the press."

MR. TREININ: May I offer 2 and 2A in evidence, your Honor?

THE COURT: They will be marked in evidence.

MR. NEUBORNE: Subject, of course, to the same objection.

THE COURT: Yes.

(Thereupon Defendants' Exhibit 2 and 2A, previously marked for identification, were received and marked in evidence.)

BY MR. TREININ:

Q. Going back to the first moratorium date, were there any black armbands in the school that you know of, other than Mr. James?

A. There were some pupils who appeared with black armbands.

Q. Any teachers?

A. Yes.

Q. How many?

A. One.

Q. And what took place in reference to that teacher?

A. The same directions were given to the principal of the school in which this teacher taught, that is, for the principal to ask the teacher to remove the armband and explain why we felt she should.

Q. And did she?

A. And she did, she complied.

Q. Were there any signs in the school in reference to moratorium day?

A. Yes, there were.

Q. What was the nature of the signs?

A. There were some wordings in regard to -- made reference to the war and peace, and some vulgarities.

Q. Where were they?

A. They were posted on some of the corridor walls.

Q. Now, during the interim between the first and second

moratorium day, was there any mention in the press of this first incident?

A. Oh, yes.

Q. Would you say there was extensive mention?

A. Very extensive.

Q. In all the media?

A. Yes.

Q. Quite naturally, it was a major topic of conversation in the Village of Addison?

A. That is correct.

Q. And after -- well, at that time after fourteen years or so, is it fair to say that you knew your people?

A. I feel I do reasonably.

Q. You talk to them?

A. Yes.

Q. Would you say there was a division of opinion in the community in reference to Mr. James' action and the action of the Board?

A. I believe so.

Q. Would you have any opinion as to where the majority opinion was?

A. Very little.

MR. NEUBORNE: I object to it.

THE COURT: I will sustain the objection, absolutely immaterial.

BY MR. TREININ:

Q. Now, we come to the second moratorium day, and what made you first aware of the fact that Mr. James was again wearing an armband?

A. I was in the high school principal's secretary's office and I saw Mr. James entering the building with an armband.

Q. And what action did you take, if any?

A. I had Mr. Pillard again approach Mr. James to ask him to remove the armband, and if he refused, to send him to my office.

Q. Ultimately did Mr. James come to your office?

A. Yes, he did.

Q. And what was the nature of the conversation on that occasion?

A. Well, I asked him some questions in regard to the letter that he received from the president of the Board of Education.

Q. What was the nature of the questions?

A. I asked him if he felt that he was not out of compliance with those instructions by wearing the armband.

Q. What did he say?

A. He indicated that the letter said that he had been reinstated with the understanding that he not become involved in political activities, he felt that wearing of the

armband was not political and therefore --

Q. What did he say?

A. He felt that the wearing of the armband was not political, therefore he felt that the letter was not binding on him.

Q. Did he give any recognition of understanding that the Board felt it was political?

A. Well, I feel that he understood that from the conversation.

Q. And he insisted on wearing the armband?

A. Yes.

Q. Before that --

MR. NEUBORNE: Excuse me, my apologies. I missed the question just before that.

(Thereupon the reporter read as follows:

"Q. Did he give any recognition of understanding that the Board felt it was political? A. Well, I feel that he understood that from the conversation.

Q. And he insisted on wearing the armband?

A. Yes.")

BY MR. TREININ:

Q. How long did this conversation last, Mr. Brown?

A. I would say approximately twenty minutes.

Q. Again, was it in the same manner, the low key manner that the first conversation was in?

A. I believe so.

Q. And did you discuss the possibility of arriving at an accommodation with Mr. James' views and Mr. James?

A. Yes, I did make some suggestions in regard to alternatives, one of which was to comply with the request to remove the armband but to do so under protest, and that I would cooperate with him in anyway that I could to go either to the Commissioner of Education or the courts. I felt in this way that he could continue his teaching and his teaching service not be interrupted, and still we could get at the basic question.

Q. Throughout this entire controversy you have given recognition to the fact that there is a basic question here?

A. Yes.

Q. Concerning which honorable men disagree?

A. That is correct.

Q. And while you felt you were acting as an educator --

THE COURT: Mr. Treinin, the trouble with this kind of a record is that all we have is yes, no, yes, no. Can't you ask questions so that Mr. Brown can give you his own views? You make your views the record,

which is not the way to proceed. These are leading questions. You can sketch out an area and then ask Mr. Brown to tell us what his views on it are or what he tried to do.

BY MR. TREININ:

Q. Will you tell us what your views are in reference to the controversy with Mr. James, your position and his position?

A. Well, as I have indicated before, I have very well established beliefs regarding the code of ethics as it applies to the introduction and the dealing with controversial issues in the classroom. I felt that that code of ethics has been supported by the policies of the State Education Department. It seems to me that it is a very commonly accepted approach to the proper way to deal with controversial issues in the classroom. I further believe that parents send their children to school with the confidence that this spirit of neutrality will be maintained. Pupils will have teachers who will try to encourage the spirit of inquiry, that controversial issues will be dealt with, but they will be dealt with from a point of view presenting as many aspects of the issue as is known, and this also does not deny the teacher the right to express his own personal views within

the context of what he is teaching, and within the context of his expertise.

Q. After the second moratorium day, after some calls back and forth, was a meeting arranged between the Board and Mr. James?

A. Yes, there was.

Q. And the Board was awaiting the opportunity to meet with Mr. James?

A. Yes.

Q. Tell us what happened after that in regard to the meeting?

A. It is my understanding that the president of the Board of Education received a letter from Mr. James indicating that he had changed his mind and that he would not be attending the meeting that had been arranged.

Q. Incidentally, under the alternatives that were offered Mr. James on the second day, was there any mention of a grievance under the Civil Service law?

A. During that conversation, yes, when we were discussing alternatives, that there is a grievance procedure under the Civil Service law.

Q. Was that accepted by Mr. James?

A. No, it was not.

Q. There is testimony here by Mr. James that on the first moratorium day you said in effect that you would get rid of him or something to that effect, did you hear it?

A. Yes, I heard his testimony. I do not agree that was said. In fact, my whole attitude at that time was that the thing could be resolved, there was no question of dismissal at that time, it was a question of temporary suspension until we found out what our respective rights were.

Q. And if he had asked to meet with you in the interim between the two moratorium dates to discuss the matter, would you have been willing to meet with him?

A. Yes.

Q. If he had asked for a meeting with the Board, would you have been willing to arrange a meeting with the Board?

A. I would have been willing to recommend to the Board of Education that they meet with him.

Q. As a matter of fact, when the opportunity was afforded, they arranged a meeting with him?

A. Yes.

Q. And the meeting of the parties was cancelled by Mr. James?

A. That is correct.

MR. NEUBORNE: Your Honor, I suppose I have no standing to raise this objection, but this is back to the leading point.

THE COURT: You may object, but I will overrule it. Mr. Treinin, ask Mr. Brown a question so that we don't have a yes or

no answer.

MR. TREININ: Yes, your Honor.

THE COURT: You may continue, Mr. Treinin.

BY MR. TREININ:

Q. Now, in the interim between the two moratorium days, did you also receive, as a school administrator, a copy of Exhibit 3, the so-called Johnson letter?

A. Yes, I did.

Q. Did you read it?

A. Yes, I did.

Q. And did you arrange so that it came to the attention of the faculty?

A. Yes, I did. Yes, the principals of the school held a faculty meeting and reviewed the memorandum with the teachers.

Q. And tell us whether or not in your opinion the principles enunciated in that letter confirmed your action taken in this matter?

A. I believe they did. In my mind, the memo was a restatement of what I understood the State Education Department policy had been for quite a large number of years.

MR. NEUBORNE: Your Honor, perhaps to save time, we don't contend at this trial that Mr. Brown maliciously fired Mr. James,

no punitive damages are sought, it is strictly a question of whether that policy was a lawful policy.

THE COURT: I will let the examination continue.

BY MR. TREININ:

Q. Now, you heard Mrs. Witchey testify here yesterday?

A. Yes.

Q. Do you recall having a meeting with her sometime after the second incident?

A. I'm sorry?

Q. Do you recall meeting with her?

A. Mrs. Witchey?

Q. Yes.

A. Yes.

Q. Were there others present?

A. There were two other teachers.

Q. What was the purpose of the meeting, as you recall it?

A. The purpose of that meeting, there was some divisiveness on the teaching staff, among teachers. Apparently they felt they had been subject of some rumors.

Q. You mean the teachers or these teachers in particular?

A. These teachers in particular. They had been supportive -- they explained to me that they had been supportive of

wanted the opportunity to explain to me why, directly rather than my receiving it by second or third hand,and we had a fairly lengthy discussion of it, during which I assured them that I recognized that this was an issue over which there was divided opinion, and certainly they were entitled to take their position, and I also assured them that any information that I got would be direct, I had very little use for the rumors. I have no recollection of any reference to a poster with the slogan "Peace with honor" being mentioned during that meeting.

Q. How long did that meeting last, do you recall?

A. It would be just an estimate, I would say a good twenty to thirty minutes.

Q. Now, I am referring to Plaintiff's Exhibit 6, in which he shows that if he were employed in 1970-71, he would be on Step 8, Level M-3 on your salary scale.

A. Yes.

Q. Is that his position on the salary schedule that he would have had if he had been there that year?

A. Well, it would be my feeling, no, because in order to qualify for the M-3 schedule he would have had to meet certain conditions.

Q. What are the conditions?

A. The conditions are -- this is the condition established by the contract that we have with the Addison Teachers

Association -- that he submit documentation establishing his advance graduate work, that he submit evidence of permanent certification, and that he request in writing horizontal transfer. He did none of those things.

THE COURT: Excuse me. What is horizontal transfer?

THE WITNESS: Well, we have a salary schedule, there are a number of categories which reflect the educational background of the teacher. As an example, a person with a Bachelors Degree, in our particular situation, would be in an A-3 schedule, where he could move vertically on the basis of his years of experience. Now, over the years, since they get advance college work, our contract recognizes advanced college work in units of ten credit hours, which allows for horizontal transfers on the schedule, which would carry with it --

THE COURT: I thought maybe it meant that he was transferred physically to some other school.

THE WITNESS: No, I am sorry.

MR. TREININ: This is a sophisticated educational device on salaries, your Honor.

THE COURT: Very well.

BY MR. TREININ:

Q. Now, as to the second year, 19 --

MR. NEUBORNE: Your Honor, may I just see the clarification? Your position was that Mr. James at the beginning of the 1970 school year did not provide you with written evidence --

MR. TREININ: He wasn't teaching.

THE WITNESS: He wasn't teaching, that is correct.

BY MR. TREININ:

Q. 1971-72, in his schedule he put himself on Step -- this is Exhibit 6 -- he put himself on Step 9, Level M-3, is that the correct step and level?

A. No.

Q. What step and level would he have been that year?

A. He would have been on our salary schedule -- you are referring to '71-72?

Q. Yes.

A. '71-72, he would have been on A-3, Step 9.

Q. And how much would he have earned if he were employed that year?

A. $10,660.

Q. And also that year did he comply with those requirements for the stepped up placement?

A. No, he did not.

THE COURT: Let me ask you this, Mr. Brown, were there any others who were hired at about the same time as Mr. James as teachers?

THE WITNESS: I would assume so, yes.

THE COURT: I see. We have heard the educational experience of Mr. James. Now, assuming that these other people had the same experience and they made the request, would they have gone into the higher grade?

THE WITNESS: Yes, they would have. My reason for making this statement is that when Mr. James was reinstated by this Court, he had the opportunity to submit those credentials and request a horizontal transfer. He did not do this.

MR. TREININ: And these are requirements, your Honor.

THE WITNESS: I am bound by the contract with the Addison Teachers Association, I could not do otherwise. In fact, I was surprised

that he did not request horizontal transfer.

MR. TREININ: Your Honor, I have a bunch of W-2's, proposed W-2's, may we enter them as one exhibit?

THE COURT: Surely.

(Thereupon, documents referred to were marked Defendants' Exhibit 8 for identification.)

BY MR. TREININ:

Q. Mr. Brown, at my suggestion did you have your administrative personnel compute a series of W-2 Forms in reference to the income tax return?

A. Yes, the payroll account clerk.

Q. Based on the salaries that you testified to that in your belief Mr. James was entitled to?

A. Yes, that is correct.

Q. I show you Exhibit 8, and ask you whether or not these are the W-2's ranging from 1970 through 1972?

MR. NEUBORNE: Are these hypothetical W-2's?

MR. TREININ: Yes.

THE WITNESS: Yes, sir, they are.

BY MR. TREININ:

Q. In 1970 did we split the year to show the amount that he actually earned for services rendered?

A. Yes.

Q. And the balance that he would have earned if he had been employed?

A. Yes, that is correct.

Q. Does this show the amount of taxes that would have been deducted both for Federal and State income taxes?

A. Yes.

MR. NEUBORNE: Your Honor, I might suggest that that is not an amount in mitigation of damages. If Mr. James is going to pay taxes on the award in this case, he can take it up with the Government.

THE COURT: We understand that.

BY MR. TREININ:

Q. So that all the figures will be before the Court, also any deductions such as F.I.C.A., wages, and so forth?

A. Yes.

MR. TREININ: That is all, Mr. Brown. Thank you, sir.

THE COURT: Let us take a brief recess now.

(Thereupon the Court was in recess at

(PROCEEDINGS RESUMED PURSUANT TO RECESS, COMMENCING AT 11:10 A.M.)

E D W A R D J. B R O W N, called as a witness on behalf of the defendants, and having been previously duly sworn, resumed and testified further as follows:

CROSS EXAMINATION BY MR. NEUBORNE:

Q Mr. Brown, so we can set the frame of reference of the questions I am going to ask you, let me read to you a sentence from the Second Circuit opinion in the case - -

THE COURT: Mr. Neuborne, this courtroom is very difficult, it is hard to hear.

MR. NEUBORNE: I will keep my voice up.

THE COURT: I think you have a slight cold, too. Keep your voice up.

BY MR. NEUBORNE:

Q I am going to read to you a sentence from the Second Circuit opinion to place in context the questions that I am going to ask you, and the sentence is this: "Any limitation on the exercise of constitutional rights can be justified only by a conclusion based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized," and it is

with that background of that sentence that I ask the following questions. Now, I think that you agreed during Mr. Treinin's cross examination that although you have strong views on this subject, you recognize that other educa s and experts in the area might disagree with you, and that it would be reasonable to hold such a contrary view?

A. Yes.

Q. I think you also told Mr. Treinin on direct examination your classroom teaching experience is comprised of two years of teaching high school mathematics, is that correct?

A. That is correct.

Q. And that classroom teaching experience took place how long ago?

A. It would be nineteen years ago.

Q. And I think to save time, we can also concede that there was no physical disruption caused by Mr. James wearing the armband, is that correct?

A. I have a little difficulty with the distinction that you make in regard to physical disruption. I believe I have testified before that - -

Q. Of course, that is not in the record, we have to do that again. When I say "physical disruption", was the discipline of the class affected?

A. I would say that the discipline of the school was normal on that occasion.

Q. And as far as Mr. James was permitted to carry out his teaching that morning on November 14th, as far as you know, he was teaching a lesson in the normal routine way that he would normally teach a lesson?

A. As far as I know, yes.

Q. No interruption in that lesson was caused at all that morning except by the - -

A. I have no way of knowing.

Q. You know of no interruption?

A. I know of no interruption.

Q. You said - - I take it you received no student complaints?

A. That is correct.

Q. Concerning - -

A. I assume we are referring to the day of the first incident?

Q. Yes. Did you receive any student complaints on the day of the second incident?

A. No, I did not.

Q. Between the first incident, which was November 14, and the second incident, which was December the 12th, the school proceeded in a normal way, I mean there was no upsurge of disciplinary problems?

A. That is right.

Q. In the months preceding Mr. James wearing the armband, September, October, 1969, did the school experience any deviation from normal disciplinary patterns?

A. As far as I know, not.

Q. Is Addison High School generally a well-behaved school?

A. Yes.

Q. Your opinion, which I accept as an honestly held opinion, that sound education was violated by Mr. James wearing the armband, is that opinion based on any study which you have made of the area?

A. Well, it has been a part of my study and experience over a long period of time, as far as the basic concepts regarding handling controversial issues.

Q. I take it that you feel strongly that all sides of controversial issues should be presented to students?

A. All known sides, yes.

Q. Do you know of any studies in the field concerning wearing armbands by teachers?

MR. TREININ: I'm sorry, I'm having difficulty hearing you.

BY MR. NEUBORNE:

Q. Do you know of any studies in the field concerning wearing armbands?

A. None in reference to armbands, specifically, no.

Q. What studies do you know of in the field that would help you have reached your opinion?

A. Well, I believe I would rely, basically, on the codes of ethics, however, I have read a number of articles and texts with reference to academic freedom, which deal with this topic, and there are materials put out by the National Council of Social Studies Teachers which deal with the handling of controversial issues.

Q. Are they all on the same general line, that all sides of controversial issues should be put before students?

A. All known sides.

Q. Do any of these studies specifically deal with wearing armbands?

A. I know of none.

Q. How about wearing religious symbols in the classroom, for example, any studies dealing with wearing a crucifix?

A. I have seen no reference to that.

Q. I take it, in your experience as a public school administrator, you have had occasion on holidays, such as Ash Wednesday or some other religious holiday, to observe teachers in your school with perhaps a spot of ash on the forehead or some other religious symbol?

A. I have seen teachers with a spot of ash, yes.

Q. Do you think that has a detrimental effect on students when they put that ash on their foreheads?

A. No.

Q. Do you think it disrupts the education that day?

A. No.

Q. I take it that you read Commissioner Nyquist's opinion in this case, have you not?

A. Yes. It has been some time, but I have read it.

MR. NEUBORNE: Your Honor, is it appropriate to mark it? I think it is in evidence. It is in the record, but I suppose we might want to mark it.

THE COURT: Mark it.

(Thereupon, document referred to was marked Plaintiff's Exhibit Number 9 for identification.)

BY MR. NEUBORNE:

Q. Here is a copy of it.

A. Okay.

Q. I take it that your views are substantially in accord with the views of Commissioner Nyquist?

A. Yes.

Q. And do you have anything in addition to the views that Commissioner Nyquist put forth in that memorandum that

rupted on that day?

A. I would have to read this in detail, Mr. Neuborne.

Q. Go ahead, I will wait.

A. (Witness examines document.)

Q. I think it would be helpful to Mr. Brown if you read back the question.

(Thereupon, the reporter read as follows: "Q. And do you have anything in addition to the views that Commissioner Nyquist put forth in that memorandum that would lead you to believe that sound education was disrupted on that day?")

THE WITNESS: I think the only other thing that I could add to it is my estimates and my judgments in regard to the local conditions surrounding these events.

BY MR. NEUBORNE:

Q. Let's explore that a bit. What was your estimate of the local conditions surrounding Mr. James wearing the armband?

A. Well, my judgment was that there was strong local support, and by local, I mean within the school district,

of the action taken by the Administration and the Board of Education.

Q. I mean on November 14th when you told Mr. James initially to take the armband off, apart from the reasons set forth in Commissioner Nyquist's opinion, did you have any other reason?

A. No, I would say essentially this covers it.

Q. As I understand your testimony about your first discussion with Mr. James on November 14th, I understand you testified that he explained to you the genesis of the armband, that it was prepared at a Quaker Meeting, that he was wearing it in connection with his relationship with the Quaker Meeting in the area?

A. That is correct. He indicated that he was a Quaker, that he had worn the armband as a result of that meeting.

Q. Did you have any doubt at the end of that meeting that at least a substantial proportion of the motivation for Mr. James wearing the armband was his religious sensibilities?

A. I had no doubt that he was trying to describe to me in a very honest way the reasons for his wearing the armband.

Q. Did you prepare a memorandum of your discussion with Mr. James that day?

A. Yes, I did.

Q. Did you provide that memorandum to the Board of Education

the next day when they were deciding whether to suspend or what action to take about the armband?

A. Yes, I did.

Q. Did you ever request Mr. James to provide some sort of statement to the Board the next day?

A. No.

Q. Did you ever invite Mr. James to come to that Board Meeting?

A. It is not my prerogative.

Q. Did you ever recommend to the Board that they invite Mr. James?

A. That question arose at some stage of the game as to whether there should be a meeting or not. I was in agreement that the Board should meet with Mr. James.

Q. That is later, I am talking now about November 15th, when the first Board Meeting was held, did you recommend that Mr. James be present?

A. No, I did not.

Q. Do you recall whether the memorandum of your conversation with Mr. James on November 14th, which you provided to the Board the next day, do you recall whether that contained any mention of the Quaker aspects of the armband?

A. The memorandum did not.

Q. It did not?

A As I recall.

Q Can you tell us why you left that aspect out of the memo?

A Well, I have a little difficulty trying to repeat other people's conversations. I am quite conscious of the fact that people have a way of quoting and misquoting.

Q You never recommended that Mr. James go to the Board and tell it to them in his own words?

A No. Frankly, I felt that the thing was going to be amicably dissolved and it didn't impress me as being a very high key sort of issue.

MR. NEUBORNE: I suppose we should mark this for identification. It is the memo.

THE COURT: All right, mark it.

MR. NEUBORNE: I'm sorry. I should have done that.

(Thereupon, document referred to was marked Plaintiff's Exhibit Number 10 for identification.)

BY MR. NEUBORNE:

Q Will you look at it and tell me if this is the memo?

A Yes, it is.

Q And I take it that we are in agreement that there is nothing in there about Quakers, Quaker meetings or the

armband?

A. I don't believe so.

Q. You submitted this to the Board the next day?

A. Yes.

MR. NEUBORNE: Your Honor, I would request that it be introduced at this time.

MR. TREININ: No objection.

THE COURT: All right, mark it in evidence.

(Thereupon, Plaintiff's Exhibit 10, previously marked for identification, was received and marked in evidence.)

BY MR. NEUBORNE:

Q. Mr. Brown, in fact, this memorandum to the Board on November 15th characterizes Mr. James' act as political?

A. Yes. It was my opinion that the impact on pupils and the interpretation because of its connection with the moratorium day would be political, regardless of tne motivation for wearing it.

Q. You didn't think it necessary to even discuss the motivation or even discuss the genesis of his having worn the armband in this memorandum?

A. Well, I did not in the memorandum. I am sure it was discussed in the meeting with the Board.

Q. Do you remember, do you now remember telling that Board orally?

A. I have no independent recollection of that.

Q. Now, at the second meeting that you had with Mr. James on December 12th, where you outlined a series of alternatives which you hoped might prevent a confrontation of this matter, did any of those alternatives include permitting him to continue to wear the armband?

A. No, they did not.

Q. Do you have any evidence at all that Mr. James harangued his class, sought to intimidate his students or sought to coerce them to believe as he did at any time during his tenure at Addison?

A. I feel symbolic speech is a form - -

Q. I'm sorry, I don't mean to interrupt, but the question is apart from just simply wearing an unadorned armband and going about his teaching duties without mentioning it, did he ever do anything else, which, in your opinion, would constitute haranguing, coercion or intimidation?

MR. FREININ: Your Honor, Mr. Neuborne used the phrase "unadorned armband". I don't understand what that means.

MR. NEUBORNE: You talked about the difference between armbands and - -

THE COURT: The armband is what it is.

MR. NEUBORNE: It is a black armband.

THE COURT: It is a black armband, so many inches wide, and that is it.

THE WITNESS: I assume you are referring to his activities within the school. Certainly, I have no direct evidence of this.

BY MR. NEUBORNE:

Q. Do you have any indirect evidence?

A. No.

Q. When you talk about Mr. James meeting with the School Board sometime - - I guess it would be late December or early January - - to see if the incident could be ironed out, you did not intend that that was going to be a hearing, you did not understand that was going to be a hearing?

A. I did not understand it would be a formal hearing.

Q. You understood that he wasn't entitled to any hearing?

A. That is correct.

Q. I take it, Mr. Brown, that the crux of the disagreement here is your feeling that Mr. James was somehow remiss in not discussing all points of view concerning the moratorium that day, or at least all known points of view?

A. That was part of my concern.

Q. Well, isn't it your entire concern, is there something else?

A. My concern was that it wasn't just what was taking place in the classroom, my concern was that he was traveling about the school with the armband and it would have an impact on students other than the ones that were in his class also.

Q. Now, I think you testified that there were one hundred teachers in Addison High School.

A. Approximately.

Q. Were there about one hundred teachers back in 1969?

A. Yes.

Q. And that Mr. James was the only high school teacher wearing an armband that day?

A. As far as I know, the only high school teacher, yes.

Q. I think you said there was one elementary school teacher that wore an armband?

A. That is correct.

Q. Do you remember what grade she was teaching?

A. I have no recollection.

Q. Did you conduct an investigation into what grade she was teaching?

A. No.

Q. Is it possible she was teaching kindergarten?

A. I suppose.

Q Do you think if a kindergarten teacher is wearing a black armband to class that it is going to disrupt the kindergarten class?

MR. TREININ: I object, your Honor. There is no evidence there was a kindergarten class involved.

THE COURT: We may find it somewhere in the evidence. I will permit the question.

THE WITNESS: I feel that it would have less impact there. However, there is a matter of being consistent in administrative decisions, and I believe what applies to one teacher should apply to others.

BY MR. NEUBORNE:

Q Even if the reason for the rules - - there were others - -

A Pardon?

Q Even if the reason for the rules is no longer present? I mean, if you don't let one teacher do something because there was a reason for it, that means you don't let somebody else do something when that reason isn't present?

A I think there is elements of that there. My interpretation and my reaction to the armband also involved not only students but fellow teachers, the devicive effect.

Q So that you ordered this elementary school teacher to take

her armband off?

A. She was requested to, and she complied without any problem.

Q. That was really an order, you were not requesting it, were you?

A. I worked through an elementary principal and my direction to him was to ask the teacher to remove it.

Q. In the high school, there were ninety-nine teachers not wearing an armband and one teacher wearing an armband on Moratorium Day, would that be accurate?

A. I assume so.

Q. And you thought you would aid the students of that school to see all points of view by having the one teacher take off his armband?

A. I don't understand your logic, Mr. Neuborne. My feeling was that I was reacting to a specific situation, I didn't generalize.

Q. Let's explore that, and I don't want to quibble with you, I am sure you held these beliefs sincerely, and I respect that, but if the overriding goal - - I take it when a teacher is supposed to have all points of view expressed, it is a physical impossibility to do so simultaneously, points of view are expressed serially in time?

A. That is correct.

Q. It might be possible for all points of view to be put

before a student body by means other than one single teacher saying each of the various points of view?

A. Certainly. I would have welcomed that approach to it.

Q. On both November 14th and December 12, 1969, I take it you concede there were differing points of view concerning the Vietnam war, the moratorium?

A. Yes, certainly.

Q. In your school on that day there was ninety-nine teachers not wearing an armband and one teacher wearing an armband, and that you felt you could aid your students in getting all points of view by having the one teacher, who wore the armband, take that armband off?

A. That was not my thinking, no. That was not my motivation for having him remove the armband.

Q. I take it you had him remove the armband because you felt that he was violating the code of ethics, and that all points of view were not being disseminated to the students?

A. That is correct. I also, at the same time, assumed that teachers were dealing with current events within the context of their courses, and I would assume that Social Studies teachers were dealing with controversial issues in a professional appropriate way.

Q. You did not issue a directive suggesting that the teachers who were not wearing the armband, who might

have current event classes, to take up both sides of the moratorium issue?

A. Did I direct them to? I don't direct curriculum on a day-to-day basis. I have confidence that within the guidelines of the syllabi, and so forth, that that type of thing goes on.

Q. Who does direct the syllabi?

A. The syllabi are constructed by the State Education Department.

Q. When the State Education Department made up the syllabus that year, did they know a moratorium was coming?

A. It is not done on an annual basis. No, I would say they didn't when they were constructed.

Q. You didn't think it necessary to supplement them at all?

A. I assumed that teachers, as a matter of routine, deal with current events within their courses.

Q. Your assumption was that students in your school were getting all points of view on this issue through the current event classes?

A. I assumed teachers were using the ethical approach to dealing with controversial issues as they arose in class.

Q. If this assumption is valid, and I hope it is, in your school, then the students who saw Mr. James wearing this armband when he was teaching English were being taught all points of view in their current event classes, is

that so?

A. I don't connect it.

Q. I do. And I ask you - -

MR. TREININ: I object to you testifying, Mr. Neuborne.

THE COURT: I think that maybe this is argumentative, Mr. Neuborne.

MR. NEUBORNE: I am sorry.

THE COURT: Why don't you ask another question?

BY MR. NEUBORNE:

Q. Let me try to rephrase that, it was argumentative and I apologize. It was your assumption, and it is my assumption, and I hope it is true, that the students at Addison High School were getting a balanced presentation through the normal curriculum that goes on in that school, is that correct?

A. That is my belief, yes.

Q. And that the eleventh grade students sitting in Mr. James' English class, who were sixteen and seventeen years old, in connection with their current events class, would be getting a balanced diet of pros and cons on serious controversial issues?

A. That could very well be.

Q. Well, could you explain to me how Mr. James wearing the

armband created an imbalance in that diet which would necessitate requiring him to remove it?

A. In the first place, he has commented that he did not discuss the armband. The armband is a symbol which carries a very strong message. It is a tradition in our country, symbols are used, and it is my understanding that Mr. James was teaching poetry, and there was no provision for a free discussion of his purposes for wearing the armband.

Q. I guess I'm not doing my job, I guess you didn't understand the question. Assume for a minute that Mr. James was making a statement, war is wrong, killing is wrong, and there are other points of view that you, as an administrator, want your students to be subjected to, I take it they were being subjected to that other point of view in their current events class?

A. I assume some of them were, I suppose some were not on this particular issue. I assume within a particular class that teachers can be confident that pupils are getting as many points of view as possible, if he restricts his activities to that particular class.

Q. Did you ever request Mr. James, either on November 14th or December 12th, or did you ever tell him that, as a condition for continuing to wear the armband he should

of view and he would be happy to discuss them with students after class?

A. I did not. I discussed with Mr. James the conditions under which I felt that it would be acceptable for him to wear an armband.

Q. But every one of those conditions was that he should take the armband off?

A. The conditions were - - I indicated to him if he put it on in the class where he was dealing with this controversial issue as a way of expressing his position in that particular class, then I feel it would be more acceptable.

Q. Let me ask you this. Why wouldn't it have solved every point of your problems, every one of your concerns, concerning the armband, simply to tell Mr. James that you must inform the students that this is a personal statement of conscience, there are other points of view, and that I would be happy to discuss them with you at your convenience, wouldn't that have solved every concern you had?

A. Mr. James indicated to me already - -

Q. Could you answer the question yes or no?

MR. TREININ: If the Court please, it can't be answered yes or no. May I ask that the witness be permitted to answer?

THE COURT: He can answer in his own way. I think Mr. Neuborne is entitled to an answer. As I understand the explanation, one of the objections that Mr. Brown had to the armband was that in his view, it only expressed one point of view. Mr. Neuborne, as I understand it, is saying to him, well now, didn't you, so that you can get your philosophy across, say to Mr. James, well, all right, so that you can get both sides of this across, explain it to the students that this is your personal religious conviction, mourning for the deaths that people are suffering unnecessarily in the war. On the other hand, there is another point of view, as expressed, perhaps in other writings of people, supporting our foreign policy, and so on and so forth, as it was being carried on, the war in Vietnam. I think he's entitled to an answer on that.

THE WITNESS: I am willing to answer. Quite frankly, it didn't occur to me to sug-

gest that he do that, but I believe that the reason it didn't occur to me was that Mr. James indicated to me that his lessons were devoted to poetry, and I feel that it would be very difficult for him to bring this into the class as an appropriate part of that lesson.

BY MR. NEUBORNE:

Q Do you have any evidence at all, Mr. Brown, that Mr. James wearing that armband had any effect on those students in his English class?

MR. TREININ: I'm sorry, I didn't hear that question.

MR. NEUBORNE: I apologize.

(Thereupon, the last question was read by reporter.)

THE WITNESS: Being unfamiliar, I am sure you mean evidence in a legal sense.

BY MR. NEUBORNE:

Q No, no, concrete facts.

A From my whole background and my understanding of the

educational process, we teachers do things, students watch them, the pupils are affected by what teachers do, pupils emulate the things the teachers do, they imitate. So it is my judgment that the wearing of the armband would, of necessity, have some effect on the students in his class.

Q. What effect?

A. They would associate this person as a teacher with a very controversial position in respect to the Vietnam war, in fact, might very well put the pupils into something of a psychological - - I'm not saying this as an expert psychologist, by the way - - into a stress situation where there is conflict between perhaps his parents' point of view and his particular teacher's point of view. This is particularly true if these childrens have brothers or fathers directly involved in the war as soldiers.

Q. Do you have any evidence that their English learning was impaired, their learning of poetry that day?

A. I have no evidence of that.

Q. I think you testified on direct examination that your personal views concerning the moratorium had nothing whatsoever to do with your decision on Mr. James?

A. No, they did not.

Q. Could we have your personal view on the moratorium,

do you agree with him or disagree with him, the moratorium generally?

A. I would suspect that to a considerable extent I would not agree with him, although I am not in favor of killing.

Q. At that time you did support the nation's policies with respect to the war in Vietnam? This is in November, December, 1969.

A. I would say not complete and wholehearted support, but I was, to a large extent, supportive of the efforts of the Government.

Q. I take it that you would have thought that it was equally a breach of teachers' ethics for a teacher to show support for the war policy by a sign or an armband?

A. I still would like to make sure that it is understood, Mr. Neuborne, that I feel there is a context and a situation in which a teacher can very well express these viewpoints within a classroom and - -

Q. Let me give you a hypothetical situation. Suppose a physics teacher, while teaching physics, was to display a symbol supportive of the Government policy on December 12, 1969, would you consider that an equivalent breach in teachers' ethics?

A. Would I now?

Q. No, would you have then?

A. I believe that my position was that that symbol of peace, this quotation that was referred to by an earlier witness, did not carry that sort of an impact with me as being a political thing. However, I can envision where, within a physics class this might be an appropriate topic for conversation and instruction, especially as it relates to the use of atomic war materials.

Q. So that if, on December 12, 1969, a physics teacher was to have displayed on the bulletin board in your school the slogan Peace With Honor, you would have thought that different than the armband, the black armband?

MR. TREININ: May I object? There is no evidence there was such a slogan, and under the circumstances, the question is improper.

MR. NEUBORNE: On cross examination, I am entitled to explore that.

THE COURT: It is cross examination and, of course, you certainly understand, you have tried many cases, that if there were no facts to support the question, then it will be ignored.

MR. NEUBORNE: Could you read the question back?

(Thereupon, the last question was

read by reporter.)

THE WITNESS: I would have only because I did not associate that with a political type of thing.

BY MR. NEUBORNE:

Q. Well, you mean you never heard the slogan Peace With Honor in connection with the support of the nation's foreign policy?

A. I was not conscious of the fact which demonstrations - - undoubtedly a shortcoming of my reading of current events of the time - - but this didn't carry the impact, the political impact. I was not conscious that this was being associated with any types of political activity.

Q. I take it you have no recollection of Carol Witchey telling you on that day that there was a teacher with such - -

A. That is correct, I have no independent recollection of her having called that to my attention.

Q. Do you doubt that it happened?

A. I believe that Mrs. Witchey is basically an honest person and would not lie about it. It may be a case of her misunderstanding or mine. But certainly, it had

no impact on me and I have no recollection of it.

Q. I guess the reason that it might not have an impact is that you did not consider Peace With Honor to be a political slogan at that time?

A. I did not understand it as such. I have had it called to my attention since that time, that it was being used in connection with such, and under those circumstances, I would have reacted differently with that knowledge.

Q. There has been testimony about the notification that you received from the Central Board of Education in Albany, the Department of Education in Albany, a Dr. Johnston's memorandum?

A. Yes.

Q. When did you receive that memorandum?

A. It was after the first incident of moratorium, it was after the November date.

Q. So that when you told Mr. James to remove the armband on November 14th, you had not seen Dr. Johnston's memorandum?

A. No.

MR. NEUBORNE: I wish we could find the text. It is a Defendants Exhibit. It might be of some help.

THE COURT: What are you looking for? Maybe we can help.

MR. NEUBORNE: Defendants' Exhibit 3.

THE WITNESS: Here it is.

MR. NEUBORNE: Ask and ye shall be given, right?

BY MR. NEUBORNE:

Q. The Johnston memorandum says nothing about teachers wearing armbands, does it?

A. Not to my recollection, no.

Q. Did you ever telephone Albany to get a clarification of what the effect of the Johnston memorandum was on Mr. James?

A. No.

Q. Do you know that Mr. James phoned Albany and had been told by Dr. Johnston's office that the memorandum did not apply to teachers wearing an armband?

MR. TREININ: I object to counsel testifying.

MR. NEUBORNE: It is in the record on direct examination.

THE COURT: Well, you see, Mr. James testified that his wife called. I suppose you are going to make a point of it. Again, I will permit the question and answer, Mr. Treinin.

BY MR. NEUBORNE:

Q. I assume the answer is no, and there really was no reason to ask it, and I apologize. Did any teachers at Addison High School, to your knowledge, ever refuse to teach with Mr. James because he wore the armband?

A. No.

Q. When he returned in the 1972-1973 school year, his relationship with the faculty wasn't overly strained because of this incident?

A. I have a little difficulty analyzing that. You understand that I am district principal, and that I don't deal - -

Q. Of course, of course.

A. I have no knowledge of any unusual strain. I know there was some reticence on the part of Mr. James when he first was about to be reinstated, but - -

THE COURT: Now, this is probably in the record somewhere, but so that I have it clear in my mind, you said district principal, Mr. Brown, what do you mean by that?

THE WITNESS: That is the equivalent of a superintendent in a city school district

THE COURT: Then, so that as far as all the schools in the school district, they are under you?

THE WITNESS: That is correct.

THE COURT: And are all the schools in the school district in one building or are they in a number of buildings?

THE WITNESS: We have three buildings.

THE COURT: Are they separated in space or contiguous one to the other?

THE WITNESS: Separated in space. In fact, one of the elementary schools is located twelve miles from the high school.

THE COURT: I see. There is an elementary school, and then you have a high school, is it junior and senior high school combined?

THE WITNESS: We have two elementary school buildings, one high school which houses grades seven through twelve.

THE COURT: Are they close to one another?

THE WITNESS: One of the elementary schools is located in the Village of Addison, and it would be approximately a half a mile from the high school to the elementary school. Then, as I say, the other elementary school is located about twelve miles from - -

THE COURT: What town is that?

THE WITNESS: It is between the Hamlets of Cameron and Cameron Mills. Our school district is a larger geographical school district, with a large number of small hamlets scattered throughout.

THE COURT: Mr. Pillard, he is the school superintendent in the high school?

THE WITNESS: He is the high school principal.

THE COURT: Your offices are also located in the same building as the high school?

THE WITNESS: My office happens to be located in the rear of the high school building, a little bit removed from the general flow.

THE COURT: As far as day in and day out problems with the school, each school, they would be left to the school superintendent?

THE WITNESS: That is correct.

THE COURT: Then when they have problems of policy or other things, they come to you?

THE WITNESS: That is correct.

THE COURT: As far as the hiring of new

teachers, is that left to you or is that done cooperatively with the various school principals?

THE WITNESS: It is a cooperative process involving the principals, my office, and then I have to work through a district superintendent who operates at a -- well, a county or multi-county level.

THE COURT: That would be similar to what we call BOCES?

THE WITNESS: Yes, it is BOCES. A person who is the district superintendent serves in a dual capacity as a representative of the State Education Department and also as a chief school administrator of the BOCES operation.

THE COURT: One other step. As far as in the unpleasant event that you have to let a teacher go, can you explain the steps that are taken in that regard?

THE WITNESS: I have to operate on the basis of recommendations through the district superintendent at the BOCES level. I have no authority to recommend directly to the Board of Education. I have to

operate through the district superintendent in his capacity as an officer of the State Education Department.

THE COURT: Let's take an elementary school teacher who taught for a year and you feel she has not properly done the job. Now, what happens? Do you get a recommendation from the school principal?

THE WITNESS: I would receive a recommendation from the school principal, and then I would have to recommend in turn to the district superintendent.

THE COURT: What about your own Board, do they - -

THE WITNESS: The Board - - the district superintendent makes the recommendation to my Board. It is sort of a strange arrangement.

THE COURT: Then what do they do?

THE WITNESS: They - - well, it depends on the timing as to when the teachers being recommended for termination and, quite frankly, this is in a state of flux, as far as the laws are concerned, because of changes in the probationary procedure. There is a procedure for terminating a

teacher during the probationary period, and there is a different procedure at the end of a probationary period when it comes to recommendations regarding tenure.

THE COURT: Generally, it is a mix where the school principals, yourself, the district superintendent and your Board - -

THE WITNESS: Yes.

THE COURT: - - are involved?

THE WITNESS: Yes.

THE COURT: Is the BOCES Board involved?

THE WITNESS: No, the BOCES Board is not involved.

BY MR. NEUBORNE:

Q So there is no doubt, Mr. Brown, you did recommend that Mr. James be dismissed?

A That is correct.

MR. NEUBORNE: Your Honor, I seem to have misplaced the salary exhibit. Here it is, it was left on the witness stand.

BY MR. NEUBORNE:

Q The salary levels that are set forth on Page 2 for 1970-1971, and 1971-1972, are they accurate as far as

they reflect what Step 8, Level M-3 teachers would receive?

A. I would have to do this on pure recollection. I believe they are. Yes, right, for those schedules.

Q. We have no question but that Mr. James is correct in listing himself as a Step 8 or Step 9?

A. That is correct.

Q. In order to qualify for - - I think you called it horizontal transfer?

A. Yes.

Q. From A-3 to the M-3 line, I think you said Mr. James would have to show certification and a substantial degree of graduate work?

A. Yes.

Q. Would eighty-five credits toward a Master's satisfy that?

A. I couldn't give an unqualified answer. I would have to evaluate those. I would assume that courses in theology would not be applicable, but even some of those might be.

Q. How about a Master's itself?

A. A Master's degree, which apparently qualified him for permanent certification in New York State, certainly would be acceptable.

Q. All that was left for Mr. James, assuming he had those qualifications, all that was left to place him on the

M-3 ladder was the ministerial act of putting in a request?

A. Well, there are some obligations under the contract with the Teachers Association, the procedure. I understand he could not have met all these obligations during the year he was not present.

Q. What obligations were they?

A. That was for budgetary purposes, filing the declaration of intent during one budget development year for the following year. In other words, so that we can budget. That could have been waived on his reinstatement.

Q. The only reason that he couldn't qualify for these situations was that he was not there to file the requests, is that so?

A. Well, the thing that bothers me, Mr. Neuborne, is that when he was reinstated and had the opportunity to file for this, I had no way of knowing if he didn't file and request this transfer - -

Q. In those two years, in 1970-1971, and 1971-1972, he could not very well have made those applications because he wasn't in school, was he?

A. He was not present.

Q. And those were the other obligations that you felt that he could not satisfy, that you just testified to, the contract obligations?

A. That is correct.

MR. NEUBORNE: Thank you, Mr. Brown.

THE COURT: I have several questions that might be helpful to me, Mr. Treinin. Mr. Brown, when I was in school, they used to call them assemblies - - I don't know what you call them now - - on special days during the year, Washington's birthday or whatever. Do you have speakers, outside speakers come in?

THE WITNESS: Occasionally we do, but in recent years, we have been somewhat limited by - - this is just a physical problem of the auditorium not being large enough to handle the whole enrollment. We have done this, we have had outside speakers on controversial issues. It is very common practice in the school, dealing with all such things as - -

THE COURT: As far as you recall, what are some of the topics covered, do you remember that?

THE WITNESS: Well, I can't remember in recent years any large assembly involving all the student body. I recall reports of - -

in fact, there were inquiries as to whether the procedure that was being followed was appropriate, and so forth, in Social Studies class - - some of the local clergymen being called in to discuss various points of view on the matter of abortion - - either abortion or birth control, I'm not quite sure which it was. I remember I was asked if I felt that was appropriate and was it acceptable. I was in agreement. The questioning as to what approach was going to be used - -

THE COURT: In your area in Addison - - I am not familiar with it. I'm more familiar with the Erie County area - - in your community there, do you have any - - for example, in South Buffalo, we have quite a few English people there - - are there any groups similar to that in your area, or is there any ethnic group that might either be a minority or majority, but let's say a recognizable group in your area?

THE WITNESS: I wouldn't say we have any

recognizable groups. We have some minorities. We have black people, in fact, we have a couple of black people on the teaching staff.

THE COURT: What I am leading up to, for example, in communities where there might be a large Polish or Irish or Italian population, you might have days where there may be some kind of a program geared to that day, which may be songs and dances, things of that nature. Is that ever done in your school?

THE WITNESS: I think the tendency is for these things to be done on the individual class basis. The tendency is for elementary classrooms to deal with these within the classroom rather than a general school type of thing.

THE COURT: Now, on the symbol thing. You said during your testimony that when you first saw the armband, in your mind the armband had a recognizable symbol in our country, extending over a period of time. What did it mean to you?

THE WITNESS: The black armband I connected with

the demonstrations that were being carried on in Washington and other places. This seemed to be the symbol they had selected to represent a position in opposition of the conduct of the war.

THE COURT: Well now, I don't mean to be argumentative about this at all, Mr. Brown, but if this was not a moratorium day, in many cultures, for some time -- maybe this is an old fashioned tradition now -- but it seems to me that armbands where many people simply recognize mourning for someone mutually, someone close to you, father, mother, a dear friend who died, and you're showing a simple mourning for that person.

THE WITNESS: I remember in my younger years that this was what it was.

THE COURT: People would wear this?

THE WITNESS: Yes. It wasn't associated with any particular religious group or political movement, at least to my knowledge.

THE COURT: Well, Mr. James' explanation,

when he made it, did it occur to you that this had a much simpler explanation?

THE WITNESS: I didn't question his motives for wearing it, but the impact. I think it's something like somebody might wear a swastika because they happen to belong to this Indian tribe that happened to use that as a symbol - -

THE COURT: That was one of the things I was going to ask you about. What about if one of your students or faculty was a member of this group, what about their wearing a swastika?

THE WITNESS: I think I would react to it in the same manner as I did the armband.

THE COURT: It is quite an extreme example, I suppose.

THE WITNESS: Yes, it has more emotional impact for some people.

THE COURT: Now, Mr. Neuborne asked you about this. I suppose some ladies without any religious conviction at all wear crosses, decorative items, and others with very strong religious convictions wear crosses. Now, if a teacher came to teach a class

in mathematics, could she have a simple necklace with a cross on it?

THE WITNESS: I would assume so. It doesn't carry that political emotional impact.

THE COURT: I suppose, again, it comes from the mind of the viewer, right?

THE WITNESS: I would assume so.

THE COURT: Now, you have one hundred people on your faculty, and I imagine there are many of them that belong to all kinds of different organizations?

THE WITNESS: Yes.

THE COURT: Some, I suppose, may belong to the American Legion?

THE WITNESS: I would assume so.

THE COURT: Maybe to some other fraternal social organizations, the Rotary Club, the Lions Club, things of that nature?

THE WITNESS: I would assume so.

THE COURT: Do some of them wear such symbols showing they belong to those organizations from time to time?

THE WITNESS: I wouldn't doubt they do. I'm not - -

THE COURT: Let's take the American Legion button. For example, I was in the Marine

Corps for about five years, Mr. Brown, and there is a little pin that the Marine Corps reserves - - some of them - - wear. Now, if a member of your faculty was a member of the Marine Corps reserve, could he wear that particular symbol?

THE WITNESS: I would assume so.

THE COURT: Would you, in seeing that on, let us say the moratorium day, in your mind would you believe that that particular individual had a particular political attitude toward the war going on at that time?

THE WITNESS: I probably would not.

THE COURT: Now, I suppose we could go right out in the street right now and some of my friends, and I am sure some people you know have, for some time, been wearing little American flags in their lapels. Have you seen some of those?

THE WITNESS: I have seen flags in lapels. That has no - - That would be to me a question of displaying patriotism.

THE COURT: Would you disagree with the fact that in the minds of many people - - for

example, on the 4th of July, I exhibited the flag in front of my home, but as far as a symbol is concerned, that wearing the flag in your buttonhole lapel day in and day out for many people became a symbol of support of the Administration, whether it was President Johnson or President Nixon, how they carried out the war?

THE WITNESS: I think this is an unfortunate use of our flag, certainly a distortion.

THE COURT: Isn't that what it became in the minds of many people?

THE WITNESS: Possibly, I don't know.

THE COURT: You were not familiar with it?

THE WITNESS: I am quite conscious of the fact that there has been comments about the President wearing a flag in his lapel. I'm not sure just what that is supposed to mean, other than to demonstrate patriotism.

THE COURT: Other people who wore the flag - - maybe back in November when this happened you didn't look at it that way - - but it seemed to me, and I wanted to ask you

about it, that many people wore the flag because they supported the Administration, and that was the symbol?

THE WITNESS: Well, I assume it goes along the same lines as the motto Peace with Honor.

THE COURT: Now, can you recall whether or not any of your faculty wore such devices?

THE WITNESS: I have no recollection of that.

THE COURT: Now, you were a mathematics teacher, Mr. Brown, and that's where your attention was focused, on mathematics, but at the same time in teaching mathematics, you had to, from time to time, get into a number of other areas?

THE WITNESS: Oh, yes, you have an obligation to do that.

THE COURT: You get into spelling and English?

THE WITNESS: Reading.

THE COURT: Reading. You would get into questions of ethics?

THE WITNESS: Correct, morals.

THE COURT: There is no question about that?

THE WITNESS: No, no question. My obligation would be - - my feeling would be that

I would try very hard to keep it within the framework of what was going on, as a planned part of the course.

THE COURT: For example, in English, I think we agree that there is much literature we look upon, which in reading it, you can't help but say the author had a very strong point of view?

THE WITNESS: Certainly.

THE COURT: That is true?

THE WITNESS: Right.

THE COURT: And so that in teaching particular subjects like that, you wouldn't stand, or the Board of Education or the Superintendent wouldn't stand over the shoulder of a teacher and say no, you can't have War and Peace, because he had a view toward - -

THE WITNESS: We exercise very little control over - - we keep informed, but we do very little in the way of censorship of what goes into the library. Teachers make their own selection of instructional material.

THE COURT: After the moratorium day, the first

time as I understand it, there were a number of letters to the editor, articles in the press?

THE WITNESS: Yes.

THE COURT: And so forth, editorials?

THE WITNESS: That is right.

THE COURT: And, as I recall, number one, they supported the position that the Administration took in regard to this problem?

THE WITNESS: I would say that there were a lot of editorials that did not support the school. There were opinions on both sides. My own very unscientific reaction would be that most of our opposition came from neighboring communities outside of our school district. Our strongest support seemed to be within the school district.

THE COURT: Now, with the Board, do you have a contract similar to a superintendent, which is renewed every so many years?

THE WITNESS: I date back to the days that they issued tenure to district principals.

THE COURT: You have tenure?

THE WITNESS: Yes. I also have an informal understanding with my Board of Education that when my services are no longer desired, they may have my resignation. I think over the nineteen years, I have submitted it at least three times.

THE COURT: Now, did you get any letters during this intervening period from parents, and did you have any conversations with parents?

THE WITNESS: I had quite a large number of conversations with parents and people in the district, and I had correspondence. I am hesitant on making reference to a lot of the correspondence because we lost quite a few of the records of the school district in the flood.

THE COURT: Now, can you recall what the attitude of the parents was, can you give us some examples?

THE WITNESS: Well, they expressed agreement with the position taken by the school administration. They made statements that they would hope that we maintain the position when controversial issues

were going to be discussed, that their children would not be propagandized and that they felt - -

THE COURT: From reading the letters, did you reach the conclusion they thought the armband was propagandizing?

THE WITNESS: I got that impression from conversations, yes, and letters.

THE COURT: When you say that people ought to see both points of view about history or mathematics, we usually say we only have one point of view - -

THE WITNESS: There are several on those, too.

THE COURT: Do you think that when you are getting across to the pupils that there may be two sides to an issue, whether it is the tariff, Social Security or others, that it always ought to be dispassionate or should it be controversial sometime?

THE WITNESS: I think it should be controversial.

THE COURT: Mr. Treinin?

MR. NEUBORNE: May I ask one question?

THE COURT: Yes.

MR. NEUBORNE: Your Honor, I have just one question.

CROSS EXAMINATION BY MR. NEUBORNE (Continued):

Q. Mr. Brown, do you belong to any of those organizations that Judge Curtin mentioned, fraternal organizations, American Legion?

A. No, I don't belong to the American Legion, although I am a veteran. I happened to be in a different branch. I was in the navy three and a half years. I don't belong to any of those fraternal organizations.

Q. Do you, in school, wear any adornments at all, for example, do you wear Masonic jewelry?

A. No, I don't belong to the Masons. I use very little of this sort of adornment.

Q. When you talk about controversial material and censoring the curriculum, it is true, isn't it, Mr. Brown, that you wouldn't let the English class go to see Romeo and Juliet because it was too controversial?

A. I recall some reference to that in some of the involvement and activities of this course. If I would not allow it, I would assume that it would be for other reasons than that I was afraid they would be exposed to something they shouldn't be exposed to. It would be a matter of censorship. I think there must have been other practical reasons why.

Q. Do you recall denying permission?

A. No, I don't recall it. As I say, I recall there was some

reference to that and I have no reason to believe that I did not, but I don't recall the reasons.

MR. NEUBORNE: I have no further questions.

REDIRECT EXAMINATION BY MR. TREININ:

Q Has anything about Romeo and Juliet ever arisen before in this case?

A. I recall something. It is probably one of the magazine articles or something that claimed that I had denied this and, as I say, I have no independent recollection of this happening, but I certainly would have no objections to high school pupils attending Romeo and Juliet.

THE COURT: Excuse me. One other question, Mr. Brown. In some schools, it has been the practice, let's say seniors in high school, where some of them go on to college, the others go to work, and it is the practice in places to permit not only employers, potential civilian employers, to come, but recruiters from the various services to come, is that a practice in your school?

THE WITNESS: Recruiters come on the same basis as college representatives come, it is arranged through the Guidance Department.

THE COURT: Go ahead, Mr. Treinin.

THE WITNESS: Could I clarify that? It is not a case of them meeting with a captive audience. We don't do it that way.

THE COURT: You put it on the bulletin board, for example, Mr. Jones will be available in Room 7?

THE WITNESS: Right.

BY MR. TREININ:

Q. Mr. Brown, Mr. Neuborne mentioned that perhaps a teacher on Ash Wednesday comes with a spot of ash on his forehead. Is there a background of great religious controversy at Addison?

A. I know of no controversies surrounding this practice.

Q. And are you mindful that the Commissioner in his decision stated as follows: "Also, it would be manifestly proper to prohibit the wearing of badges calculated on a particular occasion to constitute cause of offense to a considerable number of people, as for example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July," is that correct?

A. Yes.

Q. Do you know whether or not, to your knowledge, that is a quote from a Court of Appeals decision of the State of

New York?

A. Yes.

MR. NEUBORNE: Dated 1906.

MR. TREININ: It happens that reference is no longer relevant, unfortunately, not all over theworld.

BY MR. TREININ:

Q. But the fact is that any display of Masonic jewelry or American Legion - - there is no controversy about that in the school?

A. Carries none for me.

Q. There are no political demonstrations led by Masons or American Legionnaires, as such?

A. I'm not conscious of any.

Q. Now, in all your discussion as to the impact or what you thought about the meaning of the armband, were you concerned about your meaning or the meaning that it possibly might have to the pupils?

A. I was concerned about the impact on the pupils.

Q. And that was - - was there any other concerns thatyou had other than that?

A. No.

THE COURT: Mr. Treinin, I hate to interrupt you, but you said you were concerned

about the impact it would have on the pupils. Now, what did you think that would be?

THE WITNESS: I try to convey this, that I feel the role - - the teacher, in his role, entering the schoolhouse is, by the nature of his job, in a position of respect. Pupils tend to emulate, imitate the teacher and so forth. Therefore, here is the teacher coming in wearing an armband, stating very loudly that he is in support of that movement which is demonstating a particular position in relationship to the Vietnam war, and it is being done in such a way that it is out of context with what is being taught in the class, no opportunities be provided for free exchange.

THE COURT: Go ahead, Mr. Treinin.

BY MR. TREININ:

Q As a matter of fact, you heard Mr. James testify that on the very next day he was in Washington in the company of 500,000 people protesting as he was?

A. Yes.

Q. Is that right?

A. Yes.

MR. NEUBORNE: May I ask the relevance in that question?

THE COURT: Well, Mr. Neuborne, overruled.

BY MR. TREININ:

Q. Now, did Mr. James ever ask for an opportunity to explain to his students the meaning of the armband to him?

A. No, he did not.

Q. After the Johnston memo, did he ask for such an opportunity or suggest it?

A. No, he did not.

Q. Some discussion was had about whether there was a hearing that was proposed before the Board. Did Mr. James, in any way, ask for a hearing?

A. No, he did not.

Q. When the Board arranged for a meeting, did he come back and say I want a hearing rather than some other type of meeting?

A. No, he did not.

Q. The meeting was arranged?

A. Yes.

Q. And who broke the meeting - - who broke the appointment?

A. Mr. James wrote a letter indicating that he would not

attend.

Q. There was an assumption that perhaps a teacher in a kindergarten might have been wearing this armband, the teacher also would have been going through the corridors, is that so?

A. Yes.

Q. Also perhaps appearing in the playground or the cafeteria?

A. Yes.

Q. So the teachers are exposed to all the students in the particular school?

A. That is right.

Q. Now, there was talk about getting Mr. James to remove the armband to aid the students to get all points of view. Will you explain whether it was that or to prevent his students from getting only one point of view?

MR. NEUBORNE: Your Honor, I think that is a leading question.

THE COURT: Yes, it is a leading question. But why don't you take the question and express your views on it?

THE WITNESS: Well, I wasn't thinking of the removal of the armband as being anything positive in terms of other pupils. My request was based on my feeling that this was an improper thing to do, to

wear this armband, and I was thinking in terms of stopping what I considered an improper educational procedure and practice.

BY MR. TREININ:

Q. Now, what is a - - explain what a syllabus is?

A. A syllabus in the manner which I use it is a course outline prepared through the State Education Department, which serves as a guide, within a particular subject field, as to what should be taught in the course. Usually, a broad, general type of a guide which provides a framework within which a particular course should be taught.

Q. These are prepared by the Albany office?

A. That is correct.

Q. And distributed to the teachers of the various courses throughout the state?

A. That is right.

Q. And in the syllabi of the various courses, to your knowledge, is there any discussion as to how to treat controversial subjects?

A. I am conscious of the fact that in many of these things, there are suggestions on ways to prevent controversial issues.

Q. And you have been acquainted with that ever since your

college days, I take it?

A. Yes.

Q. It is a fixture in the school system?

A. Yes.

Q. And, in effect, did the Johnston memorandum that came in, in any way, to your mind, offer what the syllabi have been saying over the years?

A. No, I think it was - - to me it was a restatement of my impression of what the policy of the State Education Department and profession had been for a large number of years.

Q. The subject of teaching controversial issues, of course, has always been debated in the profession?

A. Yes.

Q. You made some reference to a national Council for Social Studies, do you know who they are?

A. It is one of the National organizations of Social Study teachers, coming from various levels of education. They have a national organization. They come out with statements and articles and so forth, dealing with this type of issue.

MR. TREININ: Would you mark this?

(Thereupon, document was marked Defendants Exhibit 9 for identification.)

THE COURT: We will be in recess now until 2:00 o'clock.

MR. TREININ: Thank you, your Honor.

(Thereupon, the court was in recess at 12:45 p.m.)

* * * * * * * * * * *

(PROCEEDINGS RESUMED PURSUANT TO RECESS, COMMENCING AT 2:05 p.m.)

E D W A R D J. B R O W N, called as a witness on behalf of the defendants, and having been previously duly sworn, resumed and testified further as follows:

MR. NEUBORNE: Excuse me, your Honor. I have asked Mr. Treinin whether he has any present intention of recalling Mr. James. He tells me that he has not. I have no intention of calling him. The Fresh Air Fund Children arrived in the Elmira area, and Mr. James would like to drive home. They are going to take some kids in their home. If they could leave now, they could get back in time.

THE COURT: He is not required to be here.

MR. NEUBORNE: I know that.

THE COURT: You do not want him?

MR. TREININ: No.

THE COURT: Very well, Mr. James, you are excused.

MR. JAMES: Thank you.

REDIRECT EXAMINATION BY MR. TREININ: (Continued)

Q. Mr. Brown, there was mention of the fact that you recommended dismissal of Mr. James, was that recommendation the final act in that situation?

A. No, I made my recommendation to the District Superintendent who, in turn, made his recommendation to the Board of Education.

Q. And what was the recommendation of the District Superintendent?

A. The recommendation was for termination.

Q. He is not a party to this action?

A. Not this one.

Q. And then it went back to the Board with the District Superintendent's recommendation?

A. That is correct.

Q. It was their vote that was the final action in reference to dismissal?

A. That is correct.

MR. TREININ: That is all.

MR. NEUBORNE: I have nothing further.

THE COURT: Thank you, Mr. Brown.

(Witness excused.)

MR. TREININ: I call Dr. Terino.

A N T H O N Y E. T E R I N O, called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. TREININ:

Q. Dr. Terino, you are connected with the State Education Department?

A. Yes, sir.

Q. In what capacity?

THE COURT: Excuse me. I didn't hear your full name and the spelling of your name, please.

THE WITNESS: Anthony E. Terino, T-e-r-i-n-o. My title is Director of the Division of School Supervision of the State Education Department.

BY MR. TREININ:

Q. Where do you reside, Doctor?

A. I reside in East Greenwood, just outside Albany.

Q. Will you kindly state for the record your educational background?

A. I'm a graduate of the College of the City of New York, Masters degree in English and in secondary education at Columbia University, completed work for the Doctor of Philosophy degree at New York University, in school

administration and supervision.

Q. Do you have any honorary degrees, Doctor?

A. Yes, I hold the degree of Doctor of Letters from the College of Mount St. Vincent in Riverdale.

Q. Now, have you ever served as consultant for any organizations?

A. Yes. At the present time I am the educational adviser for the State Association of School Principals, having been for many years. At one time that association was divided into two organizations; the New York State Association of Elementary School Principals, and the New York State Association of Secondary School Principals. I was their adviser, the Association of Secondary School Principals. Now that the two organizations are one, I am still their adviser. I have also been consultant for a number of school systems. I have headed State Education Department surveys, one of them right here in Buffalo on two occasions, in 1950 and then again I think a matter of about five years ago. That is the type of thing. I could go on and list many of them.

Q. Were you at one time a consultant for the State of West Virginia?

A. I was a consultant for the City of Charlestown, West Virginia, a consultant in the teaching of English.

Q. What field does your office concern itself with primarily?

A. Our office is concerned with the total school program. We visit schools, we observe the program, and we recommend that the Board of Regents accredit programs. Accreditation of the programs is provided, of course, at the high school, junior high school level only. At the elementary level it is an indirect form of approval that the State provides.

Q. Now, tell us whether or not you have specialized in Social Studies and English?

A. I have specialized in both of those. I have taught those for many years.

Q. Tell us about your teaching background?

A. Well, I started teaching in a private school --

Q. What year?

A. This was -- this is going to betray my age, but I will have to do it -- I started my teaching during the height of the Depression in 1933, I believe it was, or 1934, and then went into a public school in New Jersey. I taught in two systems there, serving as the head of the English Department, and came into New York State and taught in a school outside of Poughkeepsie, a small school system. From there I went to New York City and spent nine years there, worked my way up through competitive examinations to the position of principal, and at that point, by competitive Civil Service examination, earned a position with the State Education Department.

Q. How long have you been with the State Education Department?

A. This is my twenty-fourth year.

Q. What jobs have you held there?

A. I started as an associate supervisor of secondary education, and I became supervisor of secondary education, served as State Supervisor of English for two years. I was curriculum consultant prior to that. In fact, I wrote a curriculum brochure entitled English in Senior High School. From there in 19 -- at the beginning of 1954, through competitive Civil Service examination, I became the chief of the Bureau of Secondary School Supervision, and held that job from 1954 right on to 1973. Last spring I became the director of the Division of School Supervision, which is responsible for both elementary and secondary education.

Q. Now, Doctor, if we may place ourselves back to November 14, 1969; do you recall the context of the times during the moratorium days?

A. I remember them extremely well because I was on a short leave of absence from the Education Department, serving as the acting president of the new Community College, and I remember the tensions and the unrest during those days.

Q. Now, on the first moratorium day the plaintiff wore a black armband in an English classroom while he was teaching

youngsters some poetry, the youngsters being the age of fifteen, sixteen and seventeen. On the basis of your background and qualifications, can you tell us what the implication of that black armband is, as far as the students were concerned?

MR. NEUBORNE: Your Honor, may I have a moment to voir dire on the qualifications, being that I am not sure the Doctor has been recognized as an expert, nor am I certain as to the nature of the testimony he is about to give.

THE COURT: Well, I would think maybe that should be saved for cross examination. Why don't we do it that way?

MR. NEUBORNE: Okay.

MR. TREININ: Mr. Stenographer, may I ask that you repeat the question for the Doctor?

(Thereupon reporter read the last question.)

THE WITNESS: To the best of my knowledge, the black armband -- the wearing of the black armband at that time represented a form of protest against the continuation of the

war in Viet Nam. It represented one side of a controversial issue. The English teacher wearing that black armband, in my judgment, would be taking sides on a controversial issue in the school building. Now, if you want me to elaborate --

BY MR. TREININ:

Q. Please do.

A. Well, there has been a long standing policy that is expressed in our State syllabi, expressed in the joint codes of ethics of the New York State Teachers Association and the New York State School Boards Association, it is expressed in the publications and policy statements of national associations of teachers and school administrators, that controversial issues within the school should be presented in such a way that all available sides of that issue are presented. Now, the wearing of anything that represents one side of an issue is, in a certain sense, a form of indoctrination, you might call it a form of propogandizing. The impact upon pupils may or may not result in some overt physical reaction. It doesn't necessarily have to have that kind of reaction because the impact of a teacher on pupils cannot be measured. I think it was Henry Adams that said, "A teacher affects eternity." By that we mean the youngster may be in a

classroom and he may seem to be paying very little attention, and yet what that teacher does, what he says, what he wears may have a clear impact upon him because that teacher is an authoritative figure, he represents perhaps a higher level of education in the area that he is supposed to be teaching. You might say it is like -- well, you might call that a propoganda device, like the famous man technique, Yogi Berra, is shown in the newspapers eating Wheaties, pupils admire -- a child admires Yogi Berra, therefore Wheaties must be good for him. The same in regard to a particular position on a controversial issue. These things are -- the child gets imbued with what the teacher does and says.

Q. And in your opinion, does the wearing of the armband of necessity have some effect, some impact, educational impact, on the student?

A. Yes, but it can't be measured because that reaction is an internal one. Sometimes it is external, there were riots in some schools, there were physical protests. But the fact there are no physical protests does not make the wearing of any device that shows one side of a controversial issue, does not justify the use of that device.

Q. You mentioned physical protests as against the effect on the mind. Is the effect on the mind transitory or permanent?

A. It can be either one. In some students it might be transitory, in others it might be more permanent.

Q. But it has an effect?

A. You can't say that it has an effect on everyone, but if it has an effect on one person through the use of this propogandistic device or indoctrination, it is wrong from the standpoint of public education. I think we need to recognize that a school in modern society is a very special environment. I don't have to dialate on this, but everything we know within the past half century seems to point to the fact that the factors that used to have a strong impact on the molding of a student's mind, these factors have become dimmed over the years. Three very notable factors; the home, the church and the community, and as these three agencies have loosened their -- have slackened their ability to make an impact upon -- make an educational impact, more and more the responsibilities have been turned over to the schools. For example, you can take a matter of safe driving being taught in the schools, and many people would object to that at one time, the teaching of safe driving was left to the home. The schools have had to absorb more and more of these responsibilities and, therefore, the school is a special environment. It is the one area in which the State and school district and the public at large say, 'Here now, do

not indoctrinate children on controversial issues, teach them to think so that they are going to be able to examine these issues for themselves.'

Q. And in the process of teaching them to think, what role does the symbol play?

A. Well --

Q. Specifically the symbol of the black armband?

A. The symbol in the context in which I understand it was used was an indication that the person who wore that symbol was protesting in his own way against the Viet Nam war. But this person was operating in a privileged, special environment, which then brings up the very big question, does a teacher have the same rights within the school building that he has outside the school building?

Q. Let us hold that for a moment. You said there were three elements interested in the school environment; the right of the public was one, would you explain that, sir, what rights, on the basis of your experience, does the public have?

A. By the public, I mean the state. Organized society has a right to have all controversial issues, when they are presented in the school, and remember the fact is this, that sometimes you have to consider the age level of the child and the particular context of the school to determine when and where some of these controversial

issues shall be presented, but when they are presented, the State has a right to expect, and by the State I mean organized society, that there is going to be no propogandizing, but there is going to be an honest attempt to present all available sides, so that children can learn to think for themselves, dig up information, analyze information. Now, in the case of the Viet Nam war, there are many very outstanding Americans who took opposite sides, and they were learned people. It was a situation that caused considerable travail. Honest minds, scholarly minds took opposite positions. People like Dean Rusk, Walter Rosteau, we certainly have to consider them scholarly people, and they disagreed, of course, with the ones who wanted to terminate the war as quickly as possible.

Q. One of the other groups that you said have the rights are the school districts. What rights, in your opinion, do they have?

A. The school district is part of the state, part of society, it is a segment of it.

Q. And the third element you said are the pupils, and in your opinion what do the pupils have?

A. If we allow indoctrination to take place, where do we stop? This is precisely what happened in Nazi Germany. This is what happened in a number of dictatorships.

Q. Now, these rights that you have mentioned, have they been recognized in the State Educational System heretofore?

A. Definitely. Our syllabi, both in English and in Social Studies make it very clear that in dealing with controversial issues the teacher and the school must be prepared to present all available sides.

Q. Now, was it recognized in State Educational policy?

A. Definitely. The letter that was referred to by the previous witness --

Q. Is that the one we call the Johnson memo?

A. Yes. That was simply a reiteration of a long standing policy of the State Education Department.

Q. Are you acquainted with the code of ethics promulgated by the teachers?

A. Yes. That code of ethics -- I would like to correct you, sir, it was the Teachers Association in conjunction with the State School Boards Association.

Q. You are acquainted with that code of ethics?

A. Yes. That code of ethics again said what has been a time honored dictum in teaching in the public schools, that in dealing with controversial issues all sides be presented that can be presented conveniently.

Q. And were all sides presented by that teacher on moratorium day when he wore the armband?

A. Well, if he did nothing but wear the armband, and that was

a sign of his protest, there was no presentation of any other point of view.

Q. Of course, the teachers have commensurate rights, do they not? What are their rights, in your opinion?

A. The rights of the teacher within the school I think are distinguishable from the rights of a teacher outside of school. Outside of school they have the rights of every other private citizen. Within the school, however, the overriding consideration that limits the right of free expression of teachers, the overriding consideration is that in presenting controversial issues or partisan issues, all available sides must be presented.

Q. Now, we have talked about the rights of the teacher and the rights of the student as they walk hand in hand through the schoolhouse gate, to quote a phrase, and one takes his place at the teacher's desk, and the other at the student's desk, what are their rights and obligations as they sit there facing each other, in your opinion?

A. You mean the rights of the teacher as against the rights of the student?

Q. Relative to controversial issues.

A. The rights of a teacher, of course, are to express his humanity and his personality. I don't think you can divorce that from the subject matter, nor should you. Perhaps most of us who have gone to school remember the

fact that there was a teacher who influenced us even then. We remember this long after we have forgotten the subject matter taught to us. As a matter of fact, I would have to say to you that many of us, if not most, have been influenced in our lives by one teacher or another. In some cases that teacher may have been your mother or your father, a relative. In other cases it might have been a teacher or several teachers in school. I would have to say to you that it is very hard to distinguish between teaching of subject matter and teaching period. You've got to have the interplay of the human being with his subject matter. But there has to be a line drawn, however, as to when the values of the teacher get into the area of controversial issues. When they get into that area, there is an obligation to see that all sides of the issue are presented that are available for presentation.

Q. Now, as the student and the teacher face each other in reference to controversial issues, which in your mind is more important, the right of the teacher to express his view or the right of the student to know all views?

A. Mr. Treinin, I hate to give you an answer there because I would have to say to you that the rights of both are important. The teacher has rights that make teaching a creative act, and when one's teaching stops becoming a

creative act, then the effectiveness of teaching dies. So I don't want to take sides there. I say they are both equally important. Of course, in the case of the student, you've got a growing mind, you have an adolescent who is preparing to enter into adulthood. and he is going to carry with him a certain set of judgments, and it is very important that the school try to give him an opportunity to make these judgments on the basis of reason, and not prejudice or propoganda.

Q. In order to make it on the basis of reason, should every attempt be made to present all sides of the controversial issues being discussed?

A. Yes, and it is not an easy thing to do. This is what makes the role of the school very difficult.

Q. In your opinion, did the wearing of the armband on this occasion intrude on the work of the school?

A. I would say that it definitely did. It used an educational procedure that is frowned upon. It did intrude on the work of the school because the work of the school in a case of that type is to present the other side of the same question, which in this case was the Viet Nam war.

Q. Now, the evidence indicates that the teacher, when he wore the armband, made no comment to the class. Would you give us your opinion as to the impact of the fact that no comment was made?

A. He didn't have to make any comment; the armband, if it was really symbolic speech, spoke for itself.

Q. And whether or not in your mind the wearing of the symbol is as powerful or more powerful than actual speech?

A. It depends on the symbol and the circumstances. I heard his Honor, the Judge, make some comment about the wearing of other types of symbols. The context in which the symbol is worn means a lot. In this particular case that symbol was worn when the context was very clear. The Judge mentioned this morning the wearing of an armband to represent personal mourning, when a member of the family passes away and, very frankly, if I thought that was the reason for the wearing of the armband, as a school administrator, I know what I would do.

Q. What would you do?

A. Much as this sounds very unconventional, I would have to give the person the benefit of the doubt. If he said to me, 'Look, I lost my cousin, it's a tradition in my family to wear a black armband,' I would make it clear through the public address system, 'If you see a member of the faculty wearing a black armband, consider it a matter of personal mourning for a relative, and not what it is likely to be construed in our present day.' I would have to say the same in regard to the wearing of a swastika that his Honor referred to this morning.

Q. You mean as an Indian emblem, perhaps?

A. Certainly. If an Indian, if it is part of his tribal belief to wear a swastika, I would have to distinguish between the swastika as it is worn by an Indian and the swastika as it represents Naziism. I think it's important and possible to alert the students and the teachers, 'If you see an Indian walking around with a swastika, it is part of his tribal belief and not Hitlerism or Naziism.' Of course, in that connection, as I read this case, it seems to be vacillating between two points of view. One, that this was a matter of expressing religious belief and, on the other hand, that it was expressing freedom of speech on a political issue.

Q. As an educator, would you comment on either?

A. My point is this, that if it is a sectarian belief, the expressing of a sectarian belief in a public school has the same objections as the suppression of a political or partisan belief. If a person were to stand in front of the classroom in the garb of a nun, there would be an objection because here is sectarian religion.

Q. That happens to be the law of the State.

A. It happens to be the law and tradition. We don't sanction this.

Q. Would you comment on the factor that in the public school, in this high school, the youngsters are, in a manner of

speaking, a captive audience?

A. Well, the public school, I would have to say, is a very sensitive area of American society. The laws passed by the legislatures deal with mandates for the school regulating what shall be taught, how long it shall be taught, and so forth, and also mandate how long a child must attend school. It is a compulsory education law.

Q. Now, if someone were to comment on the situation in the colleges, from your point of view, as an educator, would there be a difference in the situation?

A. I would say so. I'm not a college specialist, although I taught in colleges.

Q. In your opinion, what would that difference be?

A. The difference is that the public school is a common school. It is a school in which society is compelled by the laws, individuals in society are compelled to send their children there or to equivalent institutions. Even the equivalent institution is bound by laws to follow pretty much the same system of organization as the public school.

Q. You are talking about parochial schools?

A. Yes, they may be parochial or independent. College is a different thing. College is an optional form of education, it is offered for an older type of student, a person past the years of adolescence, who certainly has -- who is

expected to have acquired some of these basic skills of reading, writing, interpreting, communication, analyzing propoganda, analyzing critical issues.

Q. So there is a vast difference between the two fields of operation?

A. There are differences, but even so, I think that the statement that was referred to this morning of the National Council for the Social Studies, that statement wnich dealt with tne academic freedom, I think that statement was prepared not just for the elementary and secondary schools alone, Ithink it was prepared for the teaching of controversial issues in all American education.

Q. Are you a member of the National Council or do you have contact with the National Council?

A. No. I have contact.

Q. In what way?

A. As a State Education Department official, we naturally get literature of the Council. From time to time we are asked to recommend teachers in our state to serve on committees, and from time to time we may ask them for consultants from other states.

Q. What could we -- for instance, is the National Council something like the Bar Association or the Medical Association?

A. I would say that the National Council for the Social

Studies is for the profession of Social Studies teachers what the American Medical Association is to the medical profession.

Q. And I show you Defendant's Exhibit 9 for identification, and ask what that is?

A. This is a policy statement of the National Council for the Social Studies, and it appeared in April 1971. To the best of my knowledge, it is the most recent statement on academic freedom of the Social Studies teacher.

Q. Have you studied it?

A. I have read it, yes.

Q. Is it consistent with your statement as to the policies of the State Education Department?

A. Yes, except that goes well beyond, it deals with other matters that require an awful lot of elaboration.

Q. Is the Johnson memorandum consistent with this statement?

A. Yes, definitely.

MR. TREININ: May I offer it in evidence, if the Court please?

MR. NEUBORNE: I have no objection.

THE COURT: It may be marked in evidence.

(Thereupon Defendant's Exhibit 9, previously marked for identification, was received and marked in evidence.)

THE COURT: We have a particular set of facts in front of us, Doctor, which we must, as a court of law, proceed from. It is nice to hear philosophical discourses, but the Court in any case can only make a decision on facts. Do you know why the armband was --

THE WITNESS: No, I don't, your Honor.

THE COURT: Do you know what color coat Mr. James had on that day?

THE WITNESS: No, I don't know.

THE COURT: I think it is clear, it seems foolish to ask this question, but certainly an armband on a black coat would be less observable than one on a light coat?

THE WITNESS: Your Honor, if it is observable at all --

THE COURT: My point is, you don't know, I suppose, how many pupils or other individuals saw this or would have, during the course of the day, have opportunity to observe it?

THE WITNESS: That is correct, your Honor, I don't know that.

THE COURT: You don't know, as far as the eleventh grade students there in this school -- when

Mr. Brown testified, he told us about his idea as to what this armband meant to him, and I expressed I think the more traditional view, which you have also talked about. I suppose none of us know what the knowledge was of various students there in that school about armband wearing and what it meant and what it didn't mean. We would have no way of knowing that, and I suppose you don't?

THE WITNESS: That is true, your Honor, and the reaction of the students is hard to ascertain. They may not have batted an eyelash, and yet the fact remains that some of these people might have said, 'Mr. So and So, our English teacher, he is a man who is educated, he is taking this position on this case, his position must be the right position.' We don't know how many thought that way.

THE COURT: We wouldn't know how many thought about it or would think about it at all.

THE WITNESS: That is correct, no question about it, just as we don't know how many did think so. We can't rule out in the matter of

teaching how many might have thought so. After all, he was right there in a privileged environment. Now, I have to say to your Honor that it is easy to look back, but if I had been the administrator I don't think I would have said to this gentleman, and I feel a lot of sympathy for both sides in this case, I wouldn't have said, 'Please take off your armband.' I would have said, 'If you insist on wearing your armband, I am going to have to ask you to take a day's leave of absence and wear it outside the building,' because he had every right to wear that outside the building.

THE COURT: All right, Mr. Treinin.

BY MR. TREININ:

Q. As a matter of fact, do you know that he was invited to come back the following Monday, the first moratorium day was on a Friday, did you know that?

A. Well, I'm not familiar with that aspect of it.

Q. So that in fact Mr. James was just absent that first moratorium day, did you know that?

A. I didn't know that, no.

Q. Now, Doctor, assume that on the first moratorium day Mr. James, an English teacher, wears an armband on his sleeve that is about two and a half inches wide, he is teaching poetry in an English class to students fifteen, sixteen and seventeen years old, he makes no statement concerning the band; considered in the context of the political and social situation in our country on that Friday, would, in your opinion, the wearing of that armband be a disruption of the educational process?

A. I don't like to use the word "disruptive". The word "disruptive" symbolizes physical reaction. But I would certainly say that it intruded on the work of the school. It intruded upon it because the work of the school was, if it was going to consider that issue, it should have been considered in the time honored tradition of having both sides discussed or several sides discussed by competent authorities whom the school would have brought in.

Q. You use the phrase "competent authorities"; would you give us your opinion of the problem of a teacher certified in English, teaching English, discoursing on the political implications of the Viet Nam war in the context of that moratorium day?

A. That is a very difficult question to answer for this reason. You see, a competent authority -- our first

definition of competent authority would be a person certified by the State to do that kind of teaching, and an English teacher would certainly not be considered ordinarily a competent authority to teach issues that revolved around the social studies. We have certificates that pass on the qualifications of people to teach issues involving the social studies. Having said that, however, I would have to add that there is nothing to preclude a person from making himself an expert in regard to an issue, and this is something, of course, that -- who determines that he is an expert if the State doesn't? That presents a real problem. If the District Principal were to say, 'Well, all right, I think John Jones has done a lot of reading in social studies, I think he is an expert on the Civil War or the Viet Nam war or any other issue,' then, you see, that District Principal or local school authority is taking an awesome responsibility, because if somebody is dissatisfied with the performance, then he is the one for having determined that that person who made the presentation was an expert.

Q. Our State certifies teachers in various fields of knowledge?

A. That is right.

Q. And one perhaps is English studies; the other history; the other is social studies?

A. Social studies includes history, economics, government,

sociology.

Q. It doesn't include English?

A. No.

Q. Conversely, English doesn't include social studies?

A. That is correct.

Q. And is there an important factor in the consideration of one certified in English teaching social studies?

A. Yes. In the kind of teaching that our people are expected to do today, there is an increasing requirement for depth of knowledge in a subject, and the requirements to teach English today are far more than were required years ago. The same applies to the social studies. As a matter of fact, in the social studies, to become a well-rounded social studies teacher, it requires an in-depth study in a number of subjects; sociology, the study of society, anthropology, psychology, history, economics, government, political science, and any issue revolving around the social studies is extremely complex, including the issue of the Viet Nam war.

Q. Now, Doctor, about a month passed by; Mr. James come back to the school, taught, nothing outwardly transpired in reference to the armband, and there was a great deal of reporting of the incident in the media, and then without discussing it with anyone in the school administration, on the second moratorium he again wears the same armband.

Could you tell us whether the wearing of the armband on the second occasion under those circumstances would be a disruption, or as you prefer to use -- what was the word you used?

A. The word I used was "intrusion".

Q. -- would be an intrusion on the education process?

A. Well, if all this publicity had taken place that you referred to, the intrusion would be more noticeable on the second occasion than on the first occasion. There is something else that you seem to have implied there, which brings in a different issue; however, it is probably not at all involved in the present case. If the teacher concerned, having been given notice by the school board that he would be -- did you say retained or rehired?

Q. Invited to come back.

A. Invited to come back, and he had every intention of wearing the armband again, it is very difficult to understand, from the standpoint of professional ethics, why he did not serve notice on the school board that he was planning to wear the armband again.

Q. Let's assume that he read Exhibit -- do you have a copy of Dr. Johnson's memorandum, the exhibit referred to as the Johnson memorandum?

A. This is my copy.

Q. All right. Would that in anyway change your opinion or

strengthen your opinion as to his situation in that regard?

A. Well, you see, your question -- to answer your question, I would have to say that it puzzles me as to how anyone who reads a memorandum or who is aware of a memorandum, of what it contains --

Q. Assume in this case it was read.

A. It would puzzle me as to why such a person would not serve notice on the Board of Education that if he is going back he is going to wear the armband again, that is what his intention is, unless the person thought that his posture was neutral and objective.

Q. In your opinion, was his posture neutral and objective?

A. Not from what I have already told you.

Q. Did Mr. James by wearing the armband on either occasion materially or substantially jeopardize the interest of sound education?

A. I think I have already answered that question.

Q. What was your answer?

A. My answer was that he intruded on the educational process of the school.

Q. Do you see any analogy between the message being conveyed by this armband in the context of the situation and a message being conveyed to an onlooker by a billboard or advertisement?

A. I think -- this is my own reaction -- I think that coming from the teacher -- after all, a billboard is a pretty inanimate thing -- I would say coming from a living teacher, who is a symbol to you of superior knowledge, I would say the impact, if anything, would be greater. On the other hand, you know, I have to retreat from that statement --

Q. Well --

A. -- suppose --

Q. We want all sides.

A. Suppose the billboard had shown a picture of Bridget Bardot --

Q. Dressed how?

A. That's a good question. And the person looking at it happened to be a great fan of Bridget Bardot, who is going to know what the differences in impact are?

Q. Is there a factor implicit in the student-teacher relationship of the student seeking the good will of the teacher?

A. Well, in general I think that is true. I think that in our society a pupil -- in our society there is an encouragement to be credential oriented, and pupils are looking to earn their high school credentials. There would be a tendency to do the things that are going to help them earn it and avoid the things that are going to obstruct

their earning it.

Q. Consider that in the light of the situation of Mr. James wearing the armband without making comment, would that in anyway impede the average student from asking questions or raising questions or asking for an exchange of ideas?

A. Mr. Treinin, I think that depends on the kind of relationship that existed between the teacher and the pupil. There are all ranges of relationships. There are some teachers who are very informal with their pupils and invite all kinds of questions and comments, and they are able to handle them, and there are other teachers who are very formal, and they resent any questions. You've got a different range of personalities.

Q. As far as the teacher is concerned?

A. Yes, and the pupil, too.

Q. You have a different range of personalities, as far as the students are concerned?

A. Definitely.

Q. How would it affect them?

A. Some pupils would be more outspoken than others. Even outspoken pupils would have to consider what their potential relationship with the teacher would be as a result of raising questions.

Q. I think you indicated that in your opinion the wearing of the armband violated the Johnson -- the terms of the

Johnson memorandum?

A. I don't remember whether I used the word "violated".

Q. What word would you want?

A. I said the wearing of the armband intruded on the work of the school, which is another way of saying it did not accord with the statements in the Johnson memorandum.

Q. Did it accord with the statements of ethics that you referred to?

A. No, it didn't, not in my judgment.

Q. In your opinion, was the wearing of the armband a part of the teaching process on that occasion?

A. Well, it has to be part of the teaching process if it is a symbolic communication, and that is what it is, a symbolic speech, speaking to the students.

Q. In your opinion, was it teaching or did it have the elements of indoctrination or propogandizing?

A. I would say propogandizing. There was no provision made for presenting the other side of the issue. I would say this, in all fairness to all concerned, that a person who is very much concerned about an issue of this kind and wants to see it become part of the discussion of the school, has every right to go to the principal or to the district principal and say, 'Mr. So and So, I am concerned about it, I am sure that other adults are concerned about it, I am sure that students hear about this, read about

this in the newspapers; can't we have a discussion where the various sides are presented?' I pointed out, for example, during that particular -- those particular months that I was temporarily heading a college, and all around us was rioting, even explosion of some bombs.

Q. At the college?

A. In the nearby colleges, and even though I was --

THE COURT: Excuse me, you said "nearby". Do you mean nearby to Addison?

THE WITNESS: No, no, nearby Albany.

THE COURT: What college were you at?

THE WITNESS: I was at Schenectady Community College, helping to get it going in its first year of operation. We had Union College Students, we had State University College in Albany --

THE COURT: We are getting a little far afield.

THE WITNESS: Yes, we are, I agree with you. The point I am getting at, if anyone wanted to, as a teacher -- I think a person would have a right to speak to the administration and ask for an airing of various points of view in a question of this kind.

BY MR. TREININ:

Q. It was brought out that as a result of the wearing of the

armband on the first moratorium day, the teachers passed a resolution supporting the action of the Board, I presume -- although I presume some teachers disagreed with that. Would you comment on the effect of tension in the classroom or the schoolhouse as it affects the educational process?

A. Well, without knowing whether there was any tension or what degree of tension there was there, I am very reluctant to comment on that question. Granted, the teachers took an action supporting the Board of Education, but I have to say to you all right, it's a matter of record, they took the action, but I wouldn't want to predict how much tension there was. The fact that they took an action that was contrary -- that was not in support of this teacher, may have some significance, but this is a speculative, which I don't like to do.

Q. I ask you this because during the preparation for trial another expert indicated that he felt that the presence of tension was conducive to good education, it helped the educational process.

MR. NEUBORNE: Mr. Treinin, if he wishes, can attempt to characterize Dr. Clark's testimony that way. That is not the way I read it. You will have the transcript of Dr. Clark's testimony.

THE COURT: Yes. Go ahead, Mr. Treinin.

THE WITNESS: Well, of course, the word "tension" is subject to many interpretations. There is tension with anxiety, and tension without anxiety. A person worrying about his job goes through a different form of tension. I don't know how to get involved in that, I am an educator.

BY MR. TREININ:

Q. Dr. Clark is mentioned here, are you acquainted with Dr. Clark?

A. Yes, indeed I am.

Q. What capacity does he hold in the State Education hierarchy?

A. Well, Kenneth Clark is a Professor of Psychology at the City University -- or no, City College, which is part of the City University of New York. His entire career has been spent at the college level. In fact, if I recall correctly, his entire career was spent right there at City College as a professor of psychology. I think he was mentioned in the Brown decision of the United States Supreme Court in a case relative to the segregation of children in schools.

Q. The other Brown case, the case of twenty years ago.

A. I see. Is this from the Brown case I'm in now?

Q. Yes.

A. Actually --

THE COURT: Mr. Treinin, Dr. Clark's credentials will be spread out on the record.

BY MR. TREININ:

Q. Do you know whether or not his writings have been confined?

A. Pretty much to racial matters, pretty much so. He also happens to be a member of the Board of Regents of the State of New York, which, as you may or may not know, is a sort of a school board to the State or you might even compare it to the board of trustees of a corporation, except I think that if we stick to the educational, you can call it sort of a State board of education. He is one of, I think, fifteen members of the Board of Regents.

MR. TREININ: Thank you, Doctor.

THE COURT: May I ask one or two questions, Doctor? You know, in teaching you talk about expertise in different areas. Well, you have taught English many years, and it seems to me that it would be most difficult to teach English without also getting across to a pupil either directly --

consciously you would like the pupil to know more about -- say the teacher had an interest in nature, so that the teacher then would not only teach good English, he would also be teaching something about trees, animals, and the world around us by bringing in works of very good authors in this field. That would be a method of indoctrination in a field not within English, I suppose?

THE WITNESS: Your Honor, you are one hundred per cent right. But I don't agree with the word "indoctrination".

THE COURT: Maybe I use the wrong word.

THE WITNESS: You see, English is a --

THE COURT: Creating an interest in it.

THE WITNESS: Yes. For example, if you teach a poem by Walt Whitman or Wordsworth or William Cullen Bryant or one of our modern poets, they make reference to trees, they make reference to shrubbery, they make reference to geography, and you can't teach that poem without yourself getting into some knowledge of that. The teaching of literature does require a breadth of

information.

THE COURT: That would be more particular to the problem at hand. You take the poems of Wilfred Owen and Kipling, they all have a different point of view, I suppose, on war, and if a teacher picked out the poems of one rather than the other, I think that you might say the pupils in that particular class would get a one-sided point of view.

THE WITNESS: Yes, but the teacher is not expected to have freedom to pick out for himself what he is going to teach.

THE COURT: I know there are texts, and so forth, and he follows that, but he also may bring in additional materials to make a point in English or any other course.

THE WITNESS: Oh, yes. In a case such as literature, if I understand your position, you cannot rule out a personal preference entirely. One teacher may like the poems of Kipling, another one may not like Kipling, he may feel Kipling is an Imperialist and therefore he might take the poems of Shelley, who is a rebel. That is all right, nothing wrong with that, because ultimately what

the person is really teaching isn't the politics behind the writer, but the poetic powers that that writer expresses.

THE COURT: You wouldn't criticize the teacher if he laid more emphasis on Shelley than on Whitman, would you?

THE WITNESS: Not a bit, but I don't see the poems of Shelley as a current controversial issue. Shelley was a rebel in 1820.

THE COURT: All right, let's get down to the present day. I'm sure that in the English courses in the 11th and 12th grade there are a number of pupils who read, for example, about -- maybe in the 7th, 8th and 9th grades -- writings of some of the other people about the blacks, their experience in the black community, which is certainly a very vigorous point of view, isn't that true?

Yes. I'm glad you brought that up because we certainly would have the writings of Malcom X, we would have the writings of Martin Luther King and, for that matter, in some of our text books we have the writings of that gentleman who almost

became the mayor of Newark. It's an Italo-American name, I don't recall it offhand. When they are reading them for literature, it is quite a different thing from reading them as a social truth. They are reading them for literature for the powers to express a point of view and for a discussion of that point of view, but not in relation to an opposite point of view. It is the cogency of the writer in expressing his point of view that is the subject for concentration in English. Whereas, in social studies it is different, it is not the cogency of the writer.

THE COURT: Do you think, under the context of this case, that Mr. James wearing an armband one day would have an impact greater than, for example, some other teacher who might spend a week reviewing some of the poems of anti-war poets, such as Owen?

THE WITNESS: The war poems of Owen express the feeling of Owen as he was facing battle, the personal point of view. They do not

represent a political point of view, your Honor. They don't represent the fact should England have been in the war at all. This isn't what our poets represent, even Kipling, who was by all means labeled an Imperialistic poet. You mentioned a poet before, a very good one, Ezra Pound. Ezra Pound, as you know, during World War II was considered to be a Fascist for having taken a point of view that was favorable to Mussolini, and he was living in Italy, writing poetry in English, but even so when you read Ezra Pound you are aware of his political point of view. But that is not the point, that is not the focus. The focus is Ezra Pound as a person expressing in language some ideas, esthetic ideas, because that is what his poetry does have, that is what Kipling's poetry has, that is what Owen's poetry has. The main emphasis is on the esthetics. Whereas in the social studies, the main emphasis is on the society, not the individual. All of these writers, the emphasis is on the individual. When you read Walden, for

example, by Thoreau, if you were to try to carry out the practical statements that Thoreau makes and, of course, we do know that Mahatma Ghandi did carry them out, Martin Luther King carried out some of them, civil disobedience. You know, Thoreau is great to us for being a rebel. We don't read Thoreau in the light of the kind of society he was rebelling against, we read him for a man who was articulate in expressing himself.

THE COURT: Don't you think people like that, all of those people you mention, the people that read them, that they are influenced, there is an impact upon them?

THE WITNESS: It is an impact for a different reason. It isn't a burning issue of the day, a political issue, if you will, because after all the Viet Nam war in one way or another was an issue that was a burning issue in our time.

THE COURT: Of course, according to the explanation of Mr. James, to him it was a moral issue, he wasn't interested in whether or not we had a political influence in South-

east Asia, it was a simple moral issue expressed, as far as his life was concerned, in his experience as a Quaker.

THE WITNESS: His experience as a Quaker, if they are interpreted as sectarian religious views, you must weigh those as to their propriety in the classroom. This is the position that I would have to take. Of course, in the light of the facts that have been presented here, whether it was religious or moral or whether it was political, I am wondering whether we just have terms here that are being substituted, because the facts were all the same, they represented a protest against certain governmental policies, and by representing a protest against governmental policies, they were controversial issues that did have a bearing upon the politics of the day. You see, I think this is what distinguishes them from other matters that we have been discussing.

THE COURT: Well, we will take a break. We will be back soon.

(Thereupon the Court was in recess at 3:15 p.m.)

(PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:35 p.m.)

THE COURT: Doctor Terino, you may take the stand, please.

A N T H O N Y E. T E R I N O, called as a witness on behalf of the defendants, having been previously duly sworn, resumed and testified further as follows:

CROSS EXAMINATION BY MR. NEUBORNE:

Q. Dr. Terino, you have no special knowledge of the Addison School District, have you?

A. The only knowledge I have of the Addison School District, it is one of the districts in our State, we have their records. We get records from every school of New York State. We have members of our staff visit the Addison School District. I did not consult our records for any reports of the visits of our staff to the district.

Q. You, yourself, didn't conduct any study of the Addison District in connection with your testimony in this court, did you?

A. No, sir.

Q. You have no personal knowledge of the facts and events that took place in November and December of 1969 at Addison?

A. By personal knowledge, do you mean was I there?

Q. Yes.

A. No, I wasn't there.

Q. And the testimony which you gave us is testimony really based upon your career as an educator, and not based upon any specific thing which you happen to know about Addison, it is based upon your knowledge generally of the educational needs of people in this State?

A. No, sir, I wouldn't agree with that. It is based on my knowledge of what took place, as I have been able to piece it together.

Q. Yes, but your testimony would be the same if it took place in Addison or Albany or if it took place in any of the other school districts over which you have responsibility?

A. If the situation had been the same as in the Addison case, it would be bound to be the same.

Q. Was there any public school in the State of New York, to your knowledge, on November 14th or December 12th which, in your opinion, it would have been appropriate for an English teacher to have acted like Charles James acted?

A. You mean an actual situation came to our attention?

Q. I am asking you do you know of a public school in the State of New York, under your jurisdiction, in which you would have thought it appropriate for Mr. James to have worn his armband on that day? Really I am asking you, in a terribly inartistic way, is Addison any different from any other school?

A. Addison is different from the other schools in the fact this situation occurred.

Q. Does it have any special characteristics that would lead you to apply different criteria to Addison than you would to other districts in the State?

A. I don't get it.

THE COURT: Each school district in the State is different, in size of schools, number of faculty, number of pupils, make-up economically, socially?

THE WITNESS: Yes.

THE COURT: Ethnically?

THE WITNESS: Yes.

THE COURT: The question, as I understand it, is can you think of any school district in the State where, keeping all these facts in mind, it would have been appropriate for Mr. James to have worn the armband on this day?

THE WITNESS: Not under these conditions, no.

BY MR. NEUBORNE:

Q. All right. Now, I recognize that you have strongly held feelings on this, strong opinions, you have testified to them; do you recognize that tnere are differences of opinion among educators as to the propriety of Mr. James having worn his armband under these circumstances?

A. I don't know of any other opinions on Mr. James' action. I naven't -- you might say I haven't gotten that closely involved with tne record.

Q. Would it surprise you if otner educators or repute felt that Mr. James' wearing the armband did not seriously interfere with the educational --

A. No, it wouldn't surprise me because there are different levels. When you say of repute, I don't know what you are talking about. There are educators of repute who have more experience than others. You interviewed one of them, you interviewed Regent Clark, he is an educator. Regent Clark wouldn't be an expert in secondary education. He is an educator of repute.

Q. And he disagrees with you on this point?

A. He didn't disagree with me because he doesn't know what my point of view is.

Q. He doesn't think it was improper or a violation of sound

education principles --

A. I read his deposition and I don't happen to agree with it.

Q. There is no reason you should, Doctor. I am simply asking whether there are people who might disagree with you. I would like to show you -- this is in evidence as one of the letters in Plaintiff's Exhibit 4 -- and I ask you just to take a look at it for a moment.

A. I don't see the relationship between this and your line of questioning.

Q. Perhaps I can help you. This is a letter to Mr. James from the Superintendent of Schools at Elmira. Elmira is a community --

A. I'm sorry, may I correct you? If that is Charles Davis, isn't he the District Superintendent?

Q. He signs the letter Superintendent of Schools.

A. May I see that? I'm sorry, there are two Davises, this one is the Superintendent of Elmira.

Q. Well, the second paragraph of the letter -- Elmira is a community not too far from Addison?

A. Right.

Q. Now, the second paragraph of the letter reads: "I have followed your problem situation with considerable concern and admit to being shocked by the Commissioner's ruling. Of course, I am not a lawyer but, frankly, expected a different approach in the ruling." Do you understand

from that paragraph that Mr. Davis doesn't necessarily agree with the views you put forth today?

A. You have just read that, Mr. Neuborne.

Q. Now, Dr. Terino, I show you the opinion of Commissioner Nyquist in this case. Have you seen it before?

A. Yes.

Q. Would you take a look at it for a moment?

A. I am familiar with the opinion. Do you have any specific section you want --

Q. What I specifically -- why don't you keep it. Do your views, as you express them here this afternoon, do they deviate from Commissioner Nyquist's views at all?

A. Not to my knowledge, not substantially at all.

Q. They are relatively similar?

A. The presentation that I gave earlier I think is probably pretty much in line with the citations and reasoning in this decision.

Q. And in effect you were restating in your own words the position that Commissioner Nyquist put forward in his opinion?

A. I think it is more than that. In answer to his Honor's questions, I went far beyond the discussion that is in this decision, far beyond it.

Q. Could you for the moment -- strike that. I guess the record will speak for itself. I take it you feel very

strongly that all sides of educational issues, especially the potential controversial situation, should be presented to students in the public educational context. That is a strong feeling, and I share it, and I think it's a goal we should strive for. You know, do you not, that school days in many of the school districts of this State begin with a flag salute?

A. Yes, I do.

Q. Have you issued any directives from your office instructing teachers who lead that flag salute to tell their students there is another side and perhaps they don't have to salute the flag if they don't want to?

MR. TREININ: I object to that, your Honor. That question is governed by the legislation of the State of New York.

THE COURT: Well, it is cross examination.

THE WITNESS: I was going to answer in that way. I did not issue any such statements at anytime. I have had a number of inquiries from superintendents and principals in regard to how to go about teaching the flag salute, may they excuse children from saluting the flag, and so forth. My only answer to that is to cite the law. The law says that there shall be the flag

salute, and the citations of previous -- of decisions relative to the flag salute are that the flag salute should be used by the school as a teaching session. Now, my comment to many of the schools is that it is possible if they have students object to the flag salute it is because they have not used it as a teaching session, as the court decisions have suggested that it should be.

BY MR. NEUBORNE:

Q. What if the students don't want to salute the flag, what do you tell the school districts then?

A. Well, a thing of that nature I refer to our legal division. It is no longer an administrative matter, now it is a matter of law.

Q. When you teach the flag salute, from an educational philosophy standpoint, what point of view ought a teacher articulate while the flag salute is being taught?

A. Well, you are asking me now how I would teach the flag salute?

Q. In conformity with the educational philosophy which you discussed earlier this afternoon, yes.

A. I would rather say in conformity with the law.

Q. I take it --

A. After all, it is the law that is binding here. The law says there shall be a flag salute. The decisions have indicated that the flag salute should be used as an instructional session, and I would say to you that --

THE COURT: Doctor, we understand that, that part. You say it should be used as a teaching device or aid?

THE WITNESS: Teaching experience, your Honor.

THE COURT: In keeping or in conformity with the law. Then what would happen, what would the teacher do?

THE WITNESS: The first thing, there should be some planning here. It should be -- if the teacher alone can't do this planning, there ought to be joint planning by several teachers, by committees of teachers in cooperation with the staff, but I know what I would try to do as an individual educator; I would try to bring out the meaning of the flag through discussion, and the meaning of the flag is that it represents our country. It represents our country, right or wrong, that our country can be right and our country can be wrong, but it

is our country nevertheless, and the opportunity must be there for us through the forum of discussion and action to correct or seek to correct the things that we think are wrong. Now, I think I would also point up as a teacher, teaching in the year 1974, that bringing about changes of a governmental nature is infinitely more difficult than it might have been perhaps in 1924 or fifty years before that. This is the approach I would use.

BY MR. NEUBORNE:

Q. You would do something like that every morning as the flag salute?

A. No, I wouldn't say that it would be incumbent upon me every morning. The salute is a gesture of recognition of any country. Now, the attitude toward the salute and toward my country would be a matter for discussion. Whether it would be every morning, I would rather think not. I would say that I would have sessions for that purpose. Your Honor mentioned assembly sessions this morning. It might be in the form of an assembly session. It might be in class, in the social studies class, or it might be in sessions, in small group sessions, within the

auditorium or some other room.

Q. As I understand it then, it is possible for you to do your teaching, with respect to the flag salute, and to get the various points across that you feel should be gotten across in educational philosophy, on more than one day, it can take a serial period of time, you need not achieve your educational goals immediately?

A. No question about that. You are working toward them.

Q. Would it not have been possible to have achieved the same type of balance of educational goals with Mr. James by allowing him to wear the armband on the one day, and making sure the contrary points of view were put across to the students?

A. Mr. Neuborne, I think your question might be answered in this way. Would it have been possible for Hester Prim to expiate the sin of adultery by still wearing the A on her breast? I would say that with that armband as an indoctrination in one direction, I don't think it would have been very easy to do what you say.

Q. Would it not have been possible to have either Mr. James or any other person in the school, who was designated to carry out that function, see to it that the students received all points of view concerning the Viet Nam war either on that day or on some subsequent day?

A. Let me break your question down. As to whether Mr. James

could have done it, I think that would have depended upon his qualifications.

Q. Is it possible though that he could have done it if he had the appropriate qualifications?

A. If he had the qualifications.

Q. Do you know whether he had those qualifications?

A. No, I don't. However, if he had a certificate in English and not in social studies, then to designate him to do it would have involved a degree of risk on the part of the Administration, as I testified earlier.

Q. Just so I can understand that, Mr. James, whom I think the record will show was deeply involved in the issues of Viet Nam, as I understand it, you feel might not have been qualified to discuss them with the students because he didn't have a certificate in social studies?

A. That is right; he might not have been qualified to present all available sides of this issue.

Q. But he might have been qualified?

A. If he was certified in the field of English and not in the field of social studies, it would have been proper for the Administration to conclude that he was not qualified, unless there was some overriding reason for the Administration to feel that he was qualified. Now, in assigning him to do that, it would be the Administration who would have to take the responsibility for assuming that he had

that qualification.

Q. Do you know whether they carried out an investigation to determine that?

A. I don't know that.

Q. We got off the track a bit on the flag salute, and I would like to go back to that. Consistent with your educational philosophy, if a student refused to salute the flag, would you permit that student to remain seated while the rest of the class went through the flag salute?

A. I think that has been a legal case, and I would rather not discuss it.

Q. I would like to know whether or not this conflicts, Doctor, with your educational philosophy, putting the law aside for a moment; does that conflict or not?

A. How can a State official testifying here put the law aside?

Q. I am asking you hypothetically to make believe that the law doesn't exist on the issue, and I ask you whether or not it would conflict with your educational philosophies to allow that student to remain seated while the rest of the class saluted the flag?

A. Your Honor, I really can't give a yes or no answer on that type of question. There would be a lot of things I would have to think about. I would have to think of the circumstances that motivated the youngster to do this.

I would have to think where I would allow him to sit, if I did allow him to sit. I might very easily allow him to sit, not in the same room necessarily.

Q. You wouldn't let him sit in the same room?

A. I don't know. I don't know, this is a very, very difficult question. I can't give you a snap answer on a thing like that.

THE COURT: Doctor, on the flag salute, now, as I understand it, this would usually be directed by a home room teacher, I suppose, the first thing in the morning?

THE WITNESS: It could be, your Honor, or it could be directed -- in some cases it might be in a mass situation in the assembly. Ordinarily it would be in the home room.

THE COURT: In the ordinary routine of the day?

THE WITNESS: It would be the home room.

THE COURT: As I understand it, in most schools the home room teachers are English teachers, math teachers, social science teachers, history teachers, all kinds of different teachers?

THE WITNESS: Right.

THE COURT: Now, in that connection, according to your explanation then you would have

math teachers, social science teachers, English teachers and others, mechanical drawing teachers, explaining what the flag solute was about?

THE WITNESS: Your Honor, I think your implication there - - well, I may have given you that implication, we hadn't mentioned the homeroom teacher earlier. I had mentioned that in the development of lessons in regard to the flag solute, if the teachers were not capable of planning effective lessons, these lessons would be planned in connection - - in a group situation or they may be planned by a committee of the faculty or they may be planned by specialists, and furthermore - -

THE COURT: The school is a community, in other words?

THE WITNESS: Yes, the school is a community, and more than that - -

THE COURT: So if Mr. James wasn't qualified, in your view, you give both points of view, somebody else would be there?

THE WITNESS: You are so right, your Honor. I would certainly - - Now, of course, it is

easy for me to say what I would do in those circumstances, if I felt that there was a need to discuss various sides of this issue. If I felt there was a sufficient sentiment in that school, I probably would have arranged for a discussion, but the administrative problems involved for that type of thing by no means are superficial, especially at that particular time. I probably would have said anyone who wishes to discuss the pros and cons on the issue of the Vietnam war would have the opportunity to do so by meeting in room so and so at any time during the day, where we will have various sides presented by speakers who are competent to speak on the subject.

THE COURT: All right. Mr. Neuborne?

BY MR. NEUBORNE:

Q If you had set up that kind of a program, would you then have thought it was all right for a teacher to wear a black armband?

A. No.

Q. Even though all sides were going to be pointed out?

A. You mean in that particular room and only in that room?

Q. As he went about his duties?

A. No, I'm sorry.

Q. You don't have to be sorry, it is your opinion.

A. If he wanted to wear that armband in that room where different points of view were going to be expressed, to highlight his point of view, I would see no objection even though the students would come to know that he was strongly associated with one particular thought?

A. That is why I would have said the wearing of the armband was unnecessary, as long as his point of view was going to be expressed.

Q. If he wore that in the room and the students heard him express that point of view, when he took the armband off and walked across the hall into his English class, the same students would know his position?

A. But they also have heard the other position.

Q. Bear with me. If the students would know what this teacher's position was, and as long as the opportunity to hear the other position was made available to the students, what's the difference if the teacher left his armband on?

Q. Well, if he left his armband on as he went through the school building, he was now outside the function that he

was performing in that room. In that room, he was performing the function of being one of the presenters of one point of view. By leaving that room with the armband on, he was continuing what he was supposed to be confining to one room.

Q. Thank you. When a teacher in front of the homeroom class refused to salute the flag and instead remains seated while that homeroom class salutes the flag, would you consider that to be a strong statement by the teacher to the class?

A. You see, in the teacher's response on the flag salute, again we are getting into a legal case.

Q. I am asking you whether or not from your experience as a teacher the students seeing the teacher seated quietly while they went ahead with the flag salute, would they perceive that as a statement by the teacher?

A. They would have to.

Q. It would be a strong statement, it would be repeated every morning?

A. Yes.

Q. And would you feel that that statement by that teacher was in conflict with the educational philosophy that you have discussed earlier this afternoon?

A. I think that it would constitute a problem. I would certainly try to resolve that problem.

Q. Suppose you could not resolve it?

A. Well, I - - that is a supposition. That is purely theoretical, because in the case that I am aware of, the contract of that teacher presumably did not call for duties other than the teaching of classes, I think.

THE COURT: Excuse me, Doctor. I think that whether you want to answer or not, we're entitled to an answer, leaving the law aside. We have law in this case, right now in this particular lawsuit, and you are expressing an opinion in this case. Now, I think that Mr. Neuborne is entitled to get an answer in the other case, because it seems to me that you are expressing an educational philosophy here, and in order to test that out, it seems to me he is entitled to ask about a similar situation.

THE WITNESS: Your Honor, I am trying to do it, except some of these matters are so convergent upon the work of our Legal Division - -

THE COURT: Your Legal Division is vitally concerned with this case, they went up to the Second Circuit on it. We have

law in this case, which it seems to me your Department should be very conversant with and follow. Now, you are here not as an expert in law, you are here to tell us about education, and I want to listen.

THE WITNESS: I am here as an expert in teaching and teaching at the secondary school level, your Honor. Now, I hesitate -- I have hesitated to get into this because it is so close to our Legal Division, and I feel there are people in our Department who can answer that kind of a question so far more competently than I.

THE COURT: You see, Mr. Neuborne isn't asking you about legally what you think. You may say that I am a teacher, and I say the best way to proceed is thus and so. Then the lawyers may say well, Dr. Terino, the difficulty is the law is this and this. You may say, well, that may be the law, but the facts of educational life are thus and so, and we have to do so and so.

THE WITNESS: Yes.

THE COURT: Now, that is all we are talking about, we are not talking about the law in the question, let's put the law aside, and don't worry about the lawyers, I am sure you ignore them as much as you listen to them. So, Mr. Neuborne, will you repeat your question?

MR. NEUBORNE: Yes, I will.

MR. TREININ: May I make a request? Obviously, Mr. Neuborne is referring to the Rush Henrietta case?

MR. NEUBORNE: The Russo case.

MR. TREININ: The Russo case.

MR. NEUBORNE: Among others.

THE COURT: He is talking about a situation, which I think you and I would realize is quite similar to or maybe it is the same factual situation as the Russo case, but he is not saying to Dr. Terino to express a legal viewpoint, he just wants to find out whether it is good educational philosophy to follow the direction.

MR. TREININ: I wanted to point out that if reference is being made to the Russo

case, there we had the salient fact that there was another teacher - -

MR. NEUBORNE: I object to Mr. Treinin attempting to, in effect, distinguish - -

THE COURT: Of course, he is going to ask about a situation which is different from it, but assume there is only one teacher there. Very well.

MR. NEUBORNE: Thank you.

THE COURT: Mr. Treinin, on redirect, if you want to ask the other question about the two teachers, you may.

BY MR. NEUBORNE:

Q. Dr. Terino, I think this was the question. Would you consider it consistent with your educational philosophy, the philosophy you described for us early this afternoon, for a teacher to remain seated quietly during the Pledge of Allegiance, while the class went on with the pledge?

A. No, I wouldn't consider it consistent. In regard to the flag salute, though, which you have brought up repeatedly, I would like to say that I have to live with it because it is a matter of law. Now, I have to fit that into the philosophy of education that we are trying to implement.

Q. I don't mean to be argumentative, but you are going to have to fit the First Amendment into your philosophy of education as well.

A. I don't see any conflict there. To get back to the flag salute, the flag salute, the way it has to be conducted by law is not my personal judgment, and if I had to use my personal judgment, it is very possible that I would modify it somewhat. Therefore, I have to try to adjust a philosophy in accordance with the realities that I am confronted with, and that is a reality. In regard to the teacher, the teacher refusing to salute the flag is also a reality, because apparently, that teacher could have been hired without consideration being given for her duties other than classroom teaching.

Q. Suppose there was a contract - - suppose the contract didn't talk about classroom teaching, it was a general salary agreement, it didn't talk about classroom teaching?

A. If the contract didn't describe the duties expected of the teacher, and she refuses to salute the flag, then the question has to be raised as to whether that contract was completely and carefully worded.

Q. Suppose there is no doubt but the contract covers homeroom activities, as one would generally conceive of them?

A. Homeroom activities, as one conceives them, if that

includes specifically the salute to the flag and the teacher doesn't do it, then I have to ask in my own mind whether she is violating the contract.

Q. Now, you are aware, aren't you, Doctor, that it is relatively common practice in high schools, not only in this state, but in this country, to invite military recruiters to address assemblies or to make themselves available for those students, perhaps who want to talk to them?

A. Yes.

Q. Would it be consistent with your educational philosophy for an educator to invite a military recruiter on campus without, at the same time, inviting a pacifist to discuss the evils of war?

A. I would do both, I would do both.

Q. Suppose you didn't, suppose - - if you were confronted with a situation where just the military recruiter was invited, would you think it was a violation of your educational philosophy?

A. Let's put it this way, if a pacifist wanted to speak against war, and he wanted to speak against war by virtue of the fact that we are allowing governmental agencies to recruit, I think I would be remiss if I didn't allow him to speak.

Q. I think perhaps I phrased my question a bit improperly

because we are not on the same wavelength. Suppose you have a situation where an educator, following the ordinary course that we have in New York State, invites a military recruiter, would you then feel it was incumbent upon the educator to search out a pacifist who would appear simultaneously or closely related in time to the military recruiter to present the other point of view?

MR. TREININ: Might I inquire for what purpose was the military recruiter invited to speak?

MR. NEUBORNE: I thought the purpose was irrelevant to you, I thought it was the effect of the military recruiter, isn't that what you said about the armband?

THE COURT: Mr. Treinin, you will be able to redirect.

THE WITNESS: I would have to say to you that if a military recruiter were recruiting in the school to serve in the armed forces, whether or not there should be an invitation to a pacifist to appear, would depend upon the context of the times. Very definitely, because our armed forces at the moment are recruiting,

but their activity is not necessarily war in all cases.

BY MR. NEUBORNE:

Q. Let's put ourselves back in the context of 1969, if a - -

A. Definitely.

Q. - - if a recruiter had been invited onto the Addison High School campus in 1969, would it have been a violation of your educational philosophy for the school not to have invited a pacifist as well?

A. Well, in 1969 - - it depends if there was a military draft there, I think that would present a different situation.

Q. Why?

A. Well, because the military draft represents a demand by our Government for young men to join the armed forces.

Q. But not to be recruited?

A. No, granted. But nevertheless, I would see the context as different there.

Q. Wouldn't you think the student would only be getting one side of a controversial issue?

A. I think there also would be an activity that would interfere with what the Government is doing. To solicit a pacifist to come in to school would be to engender in the minds of the young opposition to the draft.

Q. Yes, but aren't - - didn't you just tell me that it is your educational philosophy that all sides of all issues should be - -

A. Controversial issues.

Q. The draft is a controversial issue, it was in 1969?

A. I don't see it that way. If the draft was provided by the United States Government, they were taking students, taking children, the controversial issue isn't the draft, but whether to do away with the draft.

Q. All right, whether to do away with the draft. If you have a recruiter come on campus and talk about military activity, don't you think it would be incumbent upon you, given your educational philosophy, to have a pacifist talk about why military activity isn't such a good idea?

A. I would have no objection to it, depending on the context of the time.

Q. Not whether you have any objection, I think as a fair-minded man, you probably wouldn't have any objection to it.

A. Would I solicit?

Q. Would you require - -

A. I would invite a pacifist to present that point of view, yes.

Q. If the Addison Administration in 1969 didn't invite a pacifist, would they have been in violation of your

educational philosophy?

A. I suppose to the extent that you have described it, I would have to say yes.

Q. And perhaps by wearing a black armband, Mr. James might, in some way, correct the imbalance that was created by their inviting a recruiter without inviting a pacifist at the same time?

A. I don't agree with you, Mr. Neuborne. The way to correct that imbalance is to present that to the Administration to balance it. That is usurping authority that he didn't have.

Q. When we talk about presenting all sides of an educational issue, I take it the ultimate end really is the information received by the student, the student is the focus of a series of stimuli, and the important thing is that all the stimuli that are possible reach that student, that is the end of that philosophy of education, is it not?

A. Would you repeat that question?

(Thereupon, the last question was read by reporter.)

THE WITNESS: Stimuli for thinking for himself?

BY MR. NEUBORNE:

Q. Right.

A. Yes.

Q. And if you had a faculty on which you had ninety-nine people not wearing an armband on moratorium day, and one faculty member who showed up with an armband on on moratorium day, would you think by ordering that faculty member to remove the armband that you were increasing the number of stimuli reaching the student?

A. I don't see that the two are related. What you are saying is that the ninety-nine people who are not wearing armbands are not providing a variety of stimuli to the pupils, and this one person was providing the stimulus.

Q. He was providing one type of stimulus.

A. I have no way of knowing whether in the social studies class in Addison there were not teachers presenting various sides of the Vietnam issue, I would hope there were many of them.

Q. Assume there were, because I hope so too, assume those social studies teachers were teaching all sides of the issues that needed teaching, why would Mr. James having worn the armband deprive students of getting all points of view on the issue?

A. Because the students in his class were not necessarily in the classes of the others. Furthermore, if they were

to get all sides of the issue, they ought to get them from people the best qualified on the staff or off the staff.

Q. You don't know whether Mr. James was qualified?

A. I don't know that. It might have been Mr. James, it might not have been.

Q. Let me test one hypothetical against you. Suppose Mr. James had worn the armband, as you recall from hearing the testimony, he wore it for a total of twenty minutes in one English class before he was called out, suppose he had worn the armband, and at the beginning of the English class had said, 'We are going to study poetry today, I don't want you to be distracted, I am wearing an armband, it is my personal belief as a Quaker that killing is evil, that is why I am wearing it today, but it is a personal viewpoint. Please don't let it distract from the English class, and let's go on, any person who wants to discuss the matter with me, I will be available at your convenience,' would that have satisfied your educational philosophy?

A. No, because I come back to the fact that maybe he was not the best qualified person to be able to discuss all sides.

Q. Now, suppose Mr. James had been extremely well-known in the community, let me give you a hypothetical - -

A. Excuse me, let me amplify that. Mr. James' right to discuss all sides of that issue outside the school is unquestioned, but in the school, there has to be some consideration as to his competence.

THE COURT: Dr. Terino, unless times have changed, I am sure it occurred to you, it occurred when I was a student, you would have teachers whose competence was in mathematics, you can't separate the man from the teacher, he has strong viewpoints upon affairs of the nation, sports or women's dress styles or many other things. Now, you don't mean to say here that there are no teachers in the State of New York who, every day, right at this moment, are not expressing to their students, upon all different kinds of things, their personal philosophies?

THE WITNESS: Your Honor, I thought - - I tried to make it clear that a teacher who doesn't do that is likely not to make much of an impact on the students.

THE COURT: Following that, you certainly don't mean to say that if a teacher - - for

example, I remember one we had in - - at that time it was called Medieval History, history of the middle ages, this was in the mid-30's when I was in school, and he had a real thing on about FDR. I would think that almost every day he would tell us about the terrible deficiencies of that man in the White House. Now, that happens all the time. I mean, I'm sure you have mechanical drawing teachers that do that, math teachers that do that, and you don't go around putting recordings in those rooms, and calling them in to meetings, unless I suppose, if he spends so much time that the people aren't getting their lessons, but if he spent a couple of minutes a day saying, 'Did you see what the Braves did yesterday,' or 'What about those New York Mets, they are doin- a great job.' I mean, you don't go around and pull these people like this?

THE WITNESS: Not a bit, your Honor. I couldn't agree with you more on that. A teacher should be able to talk about baseball or

about particular hobbies that he likes or may dislike, and so on and so forth. Even the discussion of FDR, I wouldn't say - - there is a line here, there is a fine distinction that has to be drawn as to when do you have a really controversial issue that is of the kind of significance that warrants discussing all sides. I also - - There is a fine line, your Honor, and as far as FDR was concerned, it is the same with regard to President Nixon or any other president, there are people who are going to express themselves in favor of against, but there are sometimes when there is a graduation of issues. For example, Mr. Brown mentioned earlier the matter of abortion. Well, that can be a burning issue, you see. A teacher who expresses one point of view on abortion is going to get himself involved with the charge of taking sides on a controversial issue.

THE COURT: I am sure there are many teachers in all of the school systems in the

State, maybe in this particular school where Mr. James wore the armband, who are expressing very vigorously either support for the action of the Administration, or, on the other hand, locally were expressing disagreement and they would cut across a wide band of every kind of teacher from English to the sciences and every other kind. Don't you think that was the case that day?

THE WITNESS: I would like to amplify that a bit, you see, because we've got two separate situations here. We've got groups of teachers of different shades of political opinion or every shade of social opinion discussing questions that are of interest to the pupils, and that type of discussion could easily involve a mathematics teacher, a science teacher, a gym teacher, and so forth. But then there is a different type, a type that you might say is part and parcel of the organized instructional program and curriculum of that school, and that is the part that is entrusted to the

social studies teacher. There, of course, you have a different type of personality involved. There you have personnel who presumably, by virtue of their studies in depth of these questions may have more facts to present. Now, I don't rule out the matter of a math teacher, a science teacher, a gym teacher, as a matter of fact, on that particular day, I would certainly have encouraged it, to have different members of the faculty speaking ex capite.

THE COURT: I understand your position, it is good to have people with background in social sciences do this, but as a fact of life, on this day, you had gym teachers and all kinds of teachers, and some would ignore it, but there would be a great number who would express their own personal view, either in support of the Administration or probably a minority against the Administration?

THE WITNESS: I agree with that. I think you are right.

THE COURT: And certainly the spoken word, I believe, would have a greater impact on students than an armband?

THE WITNESS: I wish I could share that point of view, your Honor, because, as I mentioned before, when there isn't that full exchange of points of view, and the questioning that is solicited from the students - - remember, the wearing of the armband is that type of discussion, as against the open discussion. We don't know what the implications are - -

THE COURT: Take the teacher who doesn't permit any open discussion, and he speaks, and students listen, you know there are many teachers like that?

THE WITNESS: Yes.

THE COURT: And he makes a speech against the protestors against the war, and he lays out his facts and figures as to why we should support the administration on that day. Now, he is only giving one point of view. Now, you are certainly experienced with schools, wouldn't you

say that occurred in a number of classrooms in the State of New York on that day.

THE WITNESS: Your Honor, we have no - - we have absolutely not one case of that kind brought to our attention. I would say to you that if there were such a teacher, then the school was fully as culpable as the defendant in this case.

BY MR. NEUBORNE:

Q. I take it that you would think that if a teacher in Addison - -

A. Excuse me. I think I should have said what, the plaintiff instead of the defendant in this case?

Q. I think we understand. If the Administration in Addison knew of a teacher who, on December 12, 1969, had a sign "Peace with Honor" on his bulletin board, would you consider that to be a - - would you consider that teacher to be in violation of your educational principles?

A. You see, I think I would have to agree with what Mr. Brown said earlier. A quotation of Peace with Honor doesn't conjure up in my mind as clearly as does the armband one side of a controversial issue.

Q. Let me take you back for a minute. You said you remember

the events of 1969 quite well?

A. Yes.

Q. You thought about them a bit before you testified today?

A. Well, I remember them. I don't like to use too many adverbs and adjectives.

Q. Did you ever hear the slogan Peace with Honor before coming into the courtroom?

A. Yes.

Q. Does it have a connotation to you?

A. I remember that it had a connotation, whether it was a connotation that clearly represented one side of the controversy or not, I really don't know.

Q. Don't you remember that that was the slogan of pro administration forces in 1969?

A. I have to say to you that in my mind it doesn't conjure that up.

Q. If a teacher - -

A. I have to say that the words "Peace with Honor", regardless of who says it, would probably represent the aspiration of all Americans.

Q. As would a black armband dealing with killing? All Americans, I hope, oppose killing?

A. Of course, but in this particular case, it was in opposition to the perpetuation of the Vietnam war.

Q. The Peace with Honor sign you feel wasn't in favor of

the perpetuation of the war in conjunction with the Administration policies?

A. Peace with Honor was the aspiration of - - This is what it conjures up in my mind.

Q. I won't pursue it.

THE COURT: Move on to another field.

MR. NEUBORNE: Yes, your Honor.

BY MR. NEUBORNE:

Q. Mr. James, you have heard the testimony, was active in demonstrations throughout the community. I think you heard Mr. Treinin bring out the fact that he had gone to Washington on the moratorium, that he demonstrated in the community, and was known as a person who opposed the war. Can you imagine with me for a moment a teacher, highly vocal in opposition to the war, whose public identification in the community was clearly that of an anti-war leader, and who could become a symbol of opposition to the war. Now, would you have any problem with that teacher continuing to teach in a public school?

A. It would depend upon whether or not the teacher would accept certain limitations on his activities within the school building.

Q. Assume for a moment that the perception of him in the

surrounding community was as the leader of those persons in the community who oppose the war, a lot of publicity, a lot of press, a lot of outside activity, so that the students would have to know who he was, what he stood for and what he believed. Would you have any problem with that teacher continuing to teach in the public school?

A. If he comported himself within the regulations of the school, I would defend him against anybody who was criticizing him. I would defend his conduct within the school building, if it were beyond reproach.

Q. If you agree with me, and I don't want to play semantics, that individual can, himself, become a symbol by constantly associating himself with ideas?

A. Of course.

Q. It is possible for an English teacher, such as Mr. James, to be a symbol of anti-war activity in the area?

A. Yes.

Q. Why would that be different than an English teacher wearing a black armband on that day to symbolize his view?

A. I think he called attention to his symbol by wearing the armband in the English class where he was supposed to teach English. The wearing of the armband had him teaching something else as well.

Q. In the minds of the students - -

A. Regardless of what is in the minds of the students, if he had been in class without the armband and had done an effective job of teaching English, his activities outside of school would not necessarily have intruded, not at all, in fact, on the educational process, in my mind. The wearing of the armband drew a connecting link between his activities in the community and his activities in the school.

Q. There is no - - you know of no evidence that Mr. James did not adequately teach his lesson on that morning, do you?

A. No, I don't know a thing about what he taught.

Q. You mentioned that one of your - - one of the problems that you would have with symbols was a hypothetical that you gave us about a nun teaching school in her habit, and that you felt that would be a violation of sound educational policy?

A. I didn't feel that way, it is.

Q. Would it surprise you - -

A. It is forbidden.

Q. It is forbidden in New York State?

A. In the public schools.

Q. In New York State?

A. Yes.

Q Would it surprise you if I told you that the issue has come up in eight states, and that four of them allow nuns to teach, four of them don't?

A I'm fully aware of that.

Q Is there an educational philosophy that is good only for New York State and not for the other four states?

A All I can tell you is what our law is. To me, I think the law is just. That nun represents a sectarian religion.

Q I think we have once again crossed over the border from educational philosophy into law. Putting aside the legality of it, do you think that is improper, as a matter of your educational philosophy, for a nun to teach public school while wearing a habit?

A I do.

Q You do recognize that at least in four states it is permitted?

A Yes, I do.

Q I have one final question, Doctor Terino, and that is - -

THE COURT: I hate to interrupt, but, Doctor Terino, in some schools, in the black situation, there are garbs or dress which are indicative of interest of the black person in black pride or black power or to be proud of the fact that they are black, so that garbs are worn

by a number of individuals. Would you say that this would be a bad educational practice?

THE WITNESS: No. These people who wear the black African costumes are doing that to try to build a sense of pride. The people who study Swahili are trying to do the same thing, trying to develop a sense of pride. This is not a controversial issue, so why should we object to it?

THE COURT: You have schools, let us say, hopefully, that are integrated, black and white, and you know the facts of modern life, there are a number of white parents that don't like this kind of thing. Now, it is controversial as far as they are concerned.

THE WITNESS: I don't see it as a controversial matter. The parents may consider it controversial, but we are always going to have some differences from the parents. We have parents who like the way children dress. We have others who do not like the way children dress. Educationally, however, I see nothing

there that would constitute a controversial issue. In fact, it is something that I think would well bear some sort of support, that these people, these minority groups or any other kind of groups, who have to try to find some sense of identification, some sense of belonging to a fleuristic society, I think it is perfectly acceptable that they wear these.

BY MR. NEUBORNE:

Q. Do you have any objection to teachers wearing crucifixes in the school?

A. No. You see, as I was telling these gentlemen earlier, you've got a fine line here again, a small, tiny crucifix worn by a young lady who might feel particularly devout, I think it is - - I think we would be absolutely intruding upon her right as an individual to wear that.

Q. Suppose it was a fairly - - not a massive one, a good sized crucifix?

A. If the crucifix is symbolizing that the person is a clergyman, I think that would be a different situation.

Q. Really? Even if - - for example, a clergyman - - a nun - -

A. Teaching in the public school?

Q. A nun teaching in a public school who don't wear her habit, but who simply wore a crucifix that was large enough that one could see it without straining, you think that would violate your educational philosophy?

A. I can't answer that. It is a matter of degree. If it is a big crucifix that is usually worn by members of the clergy or the religious community, I would have to say to you that I think that this might be objectionable. It identifies this person as a sectarian teacher.

Q. It identifies the person as a member of the particular faith?

A. That is right.

Q. Does that automatically identify someone as a sectarian teacher?

A. The same objection would apply as would apply to the nun wearing her habit or a priest wearing his turned collar. Now, you see, you are really asking a question that brings out the difficulties of this type of situation, because there are differences, there are clear cut differences in the kind of symbols they are going to use. One symbol represents an individual way of life, and it isn't for the purpose of demonstrating openly to other people here is where I stand, where others do.

Q. Isn't that - - well, isn't that a major function of

wearing a religious emblem, demonstrating to the community at large here is where I stand?

A. I would say the wearing of a small crucifix around the neck is a symbol of the person's belief in her religion, for the same reason that I would say a St. Christopher medal in an automobile is an expectation of that person that that person is going to have some type of protection from a divine source.

Q. How about a two and a half inch black armband worn by a Quaker to symbolize distress over killing?

A. I already mentioned that, I discussed that this morning.

Q. Tell me why that is different from the crucifix?

A. First of all, it is sectarian - -

Q. Is it more or less sectarian than the crucifix?

A. It is a sectarian symbol being brought into the school.

Q. Would you answer the question? Is it more or less sectarian than a crucifix?

A. In the case of a large crucifix, I would say it is equally sectarian.

Q. How about - -

A. If it is a small crucifix, it is more sectarian.

Q. My last question to you, sir - -

A. Because, as I said before, the function of the crucifix in size is different.

Q. When a teacher wears a symbol, such as Mr. James wore,

as I understand your testimony, he makes it pretty clear to students where he stands on a certain issue?

A. Does he do it? You mean aside from the symbol?

Q. The effect of the symbol is to make it clear to students where he stands?

A. Yes.

Q. Isn't that a healthier situation than a teacher having a false facade of neutrality? Isn't it better for a student to know what the teacher's beliefs are so that he can weigh the statements of that teacher against what he knows to be the teacher's belief?

A. The facade of neutrality, if the teacher really has neutrality, I see nothing wrong with his showing neutrality. If the teacher feels more than neutrality, and he really wishes to express it in the school, I think there are legitimate ways to do so.

Q. Isn't it important for students to know what their teacher's biases are, what their teacher's beliefs are, so they can better weigh the statements of their teachers?

A. I think it depends on what the student seeks in his teacher.

Q. Isn't that one of the functions of education?

A. If the student is seeking in his teacher some knowledge of poetry, I will frankly have to say to you that the teacher's reaction to the Vietnam war might not be as

important as the knowing of the poetry.

Q. Really? If you - - let's take - - if you were studying Thoreau, wouldn't you want to know what your teacher felt about - -

A. Thoreau?

Q. If you were studying Thoreau, wouldn't it be of interest to you to know what your teacher's beliefs were, in terms of civil disobedience, in terms of war and peace, in terms of conscience and killing, don't you think that would enrich your ability to study Thoreau?

A. The study of Thoreau isn't directly related to a political issue of the moment.

Q. You said that - -

A. Wait a minute. Let me make a point clear. I said earlier, and I said this in connection with wearing the armband, that a teacher affects eternity. Thoreau wrote the essay on civil disobedience, he wrote it because he refused to pay the taxes. He said he didn't expect that was going to be taken serious by too many people. It wasn't taken serious by his own townsmen. As a matter of fact, when Ralph Waldo Emerson went to visit him in jail, and he said to him, "David, why are you here?' Thoreau made a classic answer, he said, "Henry, why are you not here?" But the truth of the matter is that Thoreau is called a revolutionist, even though he was a

very peaceful man. You see, the influence of Thoreau came many years later, and this is why in the beginning I said who knows what the affect of propagandizing on pupils is bound to be. Some of the propaganda, as in the case of Thoreau, may be very good. It is the lot of the public school, Mr. Neuborne, in American society today to insure that the children get all available sides of controversial issues. I fully sympathize with anyone who wants to have a strong feeling, such as the plaintiff did in this case, but I think that within the school boundaries, there are legitimate ways. His Honor mentioned one, he could have gotten teachers together and said, 'Look, I know you feel differently about this, let's expose the kids to our points of view, let's have it out in an honest discussion.'

Q Doctor Terino, if you were studying Thoreau with Charles James, would it be of interest to you to know whether he was a Quaker or not?

A In this particular case, the fact that Mr. James may have been a Quaker is significant to me only in respect to what he has done in the armband.

Q I asked you - -

THE COURT: Doctor, I think Mr. Neuborne is entitled to an answer to the question. Now, you want to separate Thoreau and

put him back into the time in which he wrote, but I think that you, certainly as a student, I think you would agree that there has been a great revival of interest in Thoreau during the late '60's when we were involved in the war, questions of civil disobedience, and all the rest. In that sense, he has become a modern writer, and he became of interest to and a controversy to many people who were interested in that.

THE WITNESS: Right.

THE COURT: Mr. Neuborne, can you put your question again?

BY MR. NEUBORNE:

Q. The question that I was trying to explore with you, Doctor, is would it have been of interest to a student, trying to understand Thoreau to his fullest degree of comprehension, to have understood and known that Mr. James was a Quaker with a strong conscientious feeling about life and death, would it have helped him in terms of Mr. James teaching Thoreau to him, to have him know that fact?

A. Would you try to - - I just don't get the inter-relationship

between Thoreau and Mr. James here.

Q. Assume for a minute that - -

THE COURT: Can we put it the other way around? Forget about Mr. James for a minute, and assume that the teacher was an individual who believed most strongly, say he strongly supported the Government's position in Southeast Asia, and felt in order to protect the United States we must keep any Russian influence out of Southeast Asia, and he fully described to the Domino theory, and felt that if we let one inch of territory go in South Vietnam that the next point of call would be San Francisco. Now, he is teaching English, he is teaching Thoreau. In order for the student to get an understanding of what is going on, wouldn't it be helpful to him to know what his teacher's philosophy is about this other question, about involvement in war, war generally?

THE WITNESS: I think it would be very important to have his teacher's reaction to the problems that Thoreau was dealing with.

As I remember, Thoreau wasn't dealing with war.

BY MR. NEUBORNE:

Q. You don't think that Thoreau is thought currently to have a major impact on civil disobedience and the draft and war and peace?

A. Yes, civil disobedience, but Thoreau's context of civil disobedience was a refusal to pay the local taxes. I would say that people of all shades of opinion on the Vietnam war could teach Thoreau very successfully, your Honor.

THE COURT: Let's put it a different way. Let's say you have an Irish revolutionary teaching English history, and maybe he is reading Macaulay, don't you think, so that the student can understand what this is all about, he has to know what the philosophy of the teacher is?

THE WITNESS: An Irish revolutionary teaching British history would be very interesting, your Honor, especially teaching Macaulay.

THE COURT: In order for the student to weigh what the teacher might say, he ought to

know something about the teacher, shouldn't he?

THE WITNESS: I would say that the personal values of the teacher is extremely important, your Honor. There is no question about it, but whether I would pinpoint it to the political values or the political point of view, call it any other, you may have on a crisis of such moment as the Vietnam war was, that I think is a different situation. I think we are a little far removed. I think the literature, the literary experience there is somewhat different from this tremendous pressure of the day by day banging away by television, radio and newspapers. It is a different impact.

BY MR. NEUBORNE:

Q I would like to read you, if I may, several sentences from the opinion of the Second Circuit on an earlier phase of this case. Have you read that opinion?

A No, I haven't.

Q You haven't read the opinion?

A Is that this Court?

Q That is the Appeals Court, sitting above this Court.

A I did read part of that.

Q I would like to read you some sentences, and I would like to have your reaction in light of your educational philosophy. "Several factors present here compel the conclusion that the Board of Education arbitrarily and unjustly discharged James for wearing the black armband. Clearly, there was no attempt by James to proselytize his students." Apparently, the Appeals Court felt that simply wearing an armband wasn't an attempt to proselytize his students. Do you know of any facts, other than the fact that he simply wore the armband, that would buttress your conclusion that he was proselytizing?

MR. TREININ: If the Court please, the whole decision was written on the point of view of the Court admitting, for the purposes of the motion to dismiss the complaint, that all the allegations were correct.

MR. NEUBORNE: I am asking about whether there are any facts - -

THE WITNESS: Mr. Nueborne, if you would read that again, I would like to answer it.

THE COURT: Well, we have the record, such as it is. Whether we agree with your statement or not, Mr. Treinin, this is

a question which is theoretical in nature, and I will permit it. It is cross examination.

BY MR. NEUBORNE:

Q. "Clearly, there was no attempt by James to proselytize his students."

A. Well, my answer to that is that the armband spoke, that was symbolic speech. I think that the basis for that statement is even found in the Tinker case.

Q. I ask you to take a look at Footnote 18, which is the footnote appended directly to the sentence I just read you, where the Court said, "Appellees argue that James' political activity was unacceptable in the classroom because the armband was 'the projection of an idea, it asks no comment in return and invites no discussion.' This fact alone cannot condemn a protected medium of expression." Do you agree with that?

A. It is not that factor alone. It is the factor that that practice was carried on in the light of a policy that requires limitations on the activities of a teacher within the school environment on controversial issues. I also notice that the statement that you quoted from that Appeals Court, that indicates that any limitation on the exercise of constitutional rights can be justified only

by a conclusion based upon reasonable inferences flowing from concrete facts and not abstractions, and that the interest of discipline or sound education are materially and substantially jeopardized. Incidentally, my own opinion is that there is concrete facts here. The concrete fact is that the influence of the teacher is unmeasurable, that is a concrete fact, not an abstraction.

THE COURT: I think we have to zero in on the day Mr. James wore the armband at the Addison School.

THE WITNESS: That is right.

THE COURT: Why don't you tell us what facts you see in this situation?

THE WITNESS: The facts that I see here is that on the day of such tension over social political issues, the wearing of that armband was an act that had meaning for the children, in regard to the particular stance of the person wearing the armband, and that the person was a teacher, teaching in a special environment, the school, and that there was bound to be some learning from that, and that the learning from that is not an abstraction, simply because I have

to fall back on the inference of teachers throughout history, that what a teacher starts can never be measured, that a teacher affects eternity, and the example of Thoreau, I think, is appropriate, whatever opinions, whatever judgments the student might have gotten from that armband cannot be recited because they were not physical reactions, they were intellectual reactions, cerebral reactions, and to that extent, I think that that point of view answers the statement that I have just quoted from the Court of Appeals, and I also point out that while the interest of discipline may not have been jeopardized -- incidentally, they were jeopardized, who knows that could have happened there -- The interests of sound education were jeopardized.

BY MR. NEUBORNE:

Q Going to the next sentence, it says, "It does not appear from the record that any students believed the armband to be anything more than a denying, symbolic expression of

the teacher's personal views."

A. Well - -

Q. As far as you understand - -

A. I just finished saying these things are not measurable.

Q. As far as you know, there is no fact - -

A. The fact there was no obvious reaction doesn't mean there wasn't any reaction.

Q. So that in effect really, the Court has laid down a standard which we can't measure?

A. Maybe it has, but I am speaking now of the interest of what we consider sound educational procedures in the public schools.

Q. I think you conceded at the outset of the cross examination that there are experts who would disagree with you?

A. Certainly, you did not quote them. The gentleman whose letter you read is not an expert in secondary education.

Q. He is just the superintendent of schools of Elmira.

A. I don't want to start comparing positions or experience.

Q. Kenneth Clark is not an expert on secondary education?

A. No.

Q. It is a narrow, specialized field?

A. I think there are fine people here, and they have positions in the field of education, but I would have to say to you that the extent to which they have lived in secondary schools, the extent to which they know the

curriculum, the teaching procedures and the tradition of secondary schools, I think would bear your inquiry.

Q. And you don't think Dr. Clark is qualified to give an expert opinion on this issue?

A. Expert as what?

THE COURT: He told us he doesn't.

THE WITNESS: As an expert on racial - -

THE COURT: You covered that. Certainly, I understand your position, Doctor.

MR. NEUBORNE: Thank you, Dr. Terino.

MR. TREININ: Thank you, Doctor.

THE COURT: Dr. Terino, thank you very much. Mr. Treinin, do you have another witness for tomorrow?

MR. TREININ: Yes.

THE COURT: What is his name?

MR. TREININ: Dr. Sheldon.

THE COURT: Now, he is going to come in tonight?

MR. TREININ: I hope so. He is due about 9:00 o'clock.

THE COURT: I know that you and Mr. Neuborne are going to be here at 9:15 tomorrow and I would be glad to start at that time.

MR. TREININ: That is very gracious of you.

THE COURT: Very well. It has been a very educational afternoon.

MR. TREININ: It has been for all of us, Judge.

THE COURT: Doctor, excuse the pun.

(Thereupon, the Court was in recess at 5:00 p.m.)

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

CHARLES JAMES,

Plaintiff,

-v-

CIVIL ACTION
NO. 1971-164

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, DISTRICT PRINCIPAL CENTRAL DISTRICT NO. 1; CARL PILLARD, PRINCIPAL ADDISON HIGH SCHOOL; and ROBERT ANDREWS, PRESIDENT OF THE BOARD OF TRUSTEES OF CENTRAL DISTRICT NO. 1,

Defendants,

-and-

CHARLES JAMES,

Plaintiff,

-v-

CIVIL ACTION
NO. 1974-175

EDWARD J. BROWN, et al.,

Defendants.

* *

Proceedings held before the Hon. John T. Curtin, United States District Judge, in Part II, United States Court House, Buffalo, New York, resuming on July 11, 1974.

APPEARANCES: BURT NEUBORNE, Esq., Attorney for the Plaintiff.

HARRY TREININ, Esq.,
Attorney for Defendants.

VOL. III

(PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 9:40 a.m.)

THE COURT: Mr. Treinin, when you are ready we can begin. I am sorry that I forgot about the Naturalization proceedings.

MR. TREININ: That was a great experience; we enjoyed it. In our county we don't have more than six or seven at one time, and this was a new experience for me.

THE COURT: We usually have up to ninety or one hundred every month. This was a smaller group.

MR. TREININ: Dr. Sheldon.

T H O M A S D. S H E L D O N, called as a witness on behalf of the Defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. TREININ:

Q. Dr. Sheldon, you have an office in the State Department of Education?

A. Yes, sir.

Q. What office is it?

A. I am the Deputy Commissioner for elementary, secondary

and continuing education in the State.

Q. Will you give your educational background, Doctor?

A. Yes. I began as a teacher in 1942. Would you like this historically?

Q. Yes.

A. All right. A teacher in 1942, subsequently became a vice-principal and high school principal in Central New York. I moved to Hempstead, Long Island as a high school principal, became an Assistant Superintendent of Schools, Superintendent of Schools in Hempstead, became Superintendent of Schools in the City of Baltimore --

Q. For how long?

A. For the City of Baltimore, three years. At the conclusion of that service I was invited to become the Deputy Commissioner of New York State.

Q. In what year?

A. 1971.

Q. And you have been Deputy Commissioner since that time?

A. Yes, sir.

Q. And will you tell us of what college you are a graduate?

A. I am a graduate of Syracuse University.

Q. Any other educational background?

A. Yes, I have a Masters and Doctoral degrees.

Q. From what colleges?

A. All of these from Syracuse.

Q. When did you receive them?

A. I believe the Masters degree in 1949 and the Doctoral degree in 1958.

Q. Now, in your present capacity what is your field of endeavor?

A. Well, the State Education Department is divided essentially into two branches, as far as construction is concerned. My responsibilities are for the elementary, secondary and adult education programs throughout the State.

Q. More specifically, in reference to secondary education, what are your duties?

A. Well, we have -- in secondary education we have an instructional branch with an assistant commissioner, and within that we have a Bureau of Secondary School Supervision, we have another bureau for curriculum. There are various offices responsible for the supervision, for the production of curriculum for the schools of the State, and for seeing that the various regulations and laws pertaining to education in the State are adequately carried out, and for providing advice to the local superintendents in districts of the State, and for again making sure, in a supervisory sense, that the proper regulations are carried out, that advice is given to help them with their work.

Q. Your jurisdiction extends over the entire state, including

New York City?

A. All of the schools of New York.

Q. Generally, are you acquainted with the factual situation in this case?

A. Yes, I am.

Q. Doctor, would you make any comment that you desire as to the schools special environment, as a place of special environment?

A. Yes, the school is, of course, developed by society to serve the children, and through serving the children, the citizens and future citizens of the country. In that sense, everything that goes on in the school should be devoted to that welfare, and in that same sense then, those who serve the schools in any capacity have certain directions that they are impelled and, as a matter of fact, we think by regulations and law are required to follow. There is a certain special set of conditions that pertain to educators, including teachers, principals, superintendents, the entire line.

Q. Now, in this environment, is it fair to say that there are three components involved; the public, as represented by the State or school board, the student and the teacher?

A. Those three exist, there is no question about that.

Q. Do you have any --

MR. NEUBORNE: Excuse me. Could I interpose an

objection? If we are going to have testimony from an expert of Dr. Sheldon's stature, I suggest it be his testimony and not Mr. Treinin's.

THE COURT: Yes. I know, Mr. Treinin, you have thought a lot about the case and are familiar with it and, I suppose, in talking with Dr. Sheldon, you are familiar with his views, but let the Doctor testify.

BY MR. TREININ:

Q. Would you comment on the rights and obligations of each of those sections?

A. Yes, I will. I think that two of them, the State and the governments of school system, including the School Board, and those who work with it, have an obligation to the child and to that citizenry. What they do, what they must do, flows out of that citizenry, the nation and the state. What they do internally then is that intermediate agency has to do directly and most importantly with the welfare of the children in that environment, the third of the groups that I think you suggested. Now, the middle group, and I think this is pertinent to this particular case, in view of their obligations to the

children, must at certain times set aside certain things that are ordinarily regarded as freedoms in the external, quote, normal, close quote, environment outside of this particular special educational structure. In some cases freedom of speech, which I understand is an issue in this case, cannot be as free and unfettered as would be the case if I were an ordinary teacher in the civil environment outside of the school setting. There are good and sufficient reasons for that.

Q. What are they?

A. They are these; that the student is entitled to an unprejudiced educational environment, that he should be given the opportunity to learn the things that are important in our society, to have an opportunity to question them, to be presented as many points of view as seem pertinent to any particular issue, and to question a point of view on these issues. In that sense then, I cannot walk into a classroom and allow my own personal views on any particular issue to prevail, without these other opportunities.

Q. What would you comment on the right of the public in this situation?

A. Well, all of that, of course, is subject to the right of the public. The public expects that that will be the environment within which their schools will be conducted,

that the children they send into these schools will be afforded these opportunities for multi views with respect to important considerations.

Q. In this respect as the State formulated a group of rules which have been referred to perhaps as syllabi for the various courses?

A. Yes. There are numerous statements, I am sure we could develop a compendium of them, that pertain to this issue, saying that this is a fundamental, it occurs in the schools of education, it is accepted in the profession that that is indeed the direction that teachers should take. From time to time there are particular views set forth under certain conditions that express this more clearly than at other times.

Q. Confining ourselves for the moment to the field of social studies, are you acquainted with the syllabi in that field?

A. Most of them in New York State, yes, sir.

Q. And what do the syllabi state on the question of presentation of controversial issues in the classroom?

A. I think what I have just said, that all aspects of the particular question should be presented and analyzed, as best one can, in the classroom. As a matter of fact, the Council of Social Studies agrees that that is an important tenet in education and in the social studies,

and has set it forth in its own statement.

Q. Is this a recent development?

A. No, not to my knowledge. I think this is historical. That doesn't mean that there haven't been societies that have gone in a different direction, and I don't think that we are referring here to those. The Nazi society is well known in that they did not allow this to happen, and they produced a generation of young men and women who saw one side of an issue, and fought for their nation in terms of it, even though the underlying motives were not good. That is not the American tradition.

Q. And are you acquainted with what we have come to call the Johnson memorandum that was issued in anticipation of the celebration of moratorium day?

A. Yes, I came to the department shortly after that period of time. I have read that memorandum a number of times. Of course, I read that before coming here.

Q. And, as a matter of fact, you are successor to Dr. Johnson?

A. I am, that is correct.

Q. And will you tell us whether, in your opinion, the suggestions in that memorandum are in conformity with good educational practices?

A. I think they are completely in line with good practice. I think that on the part of Dr. Johnson that was a good thing to do in the particular set of circumstances which

existed at that time.

Q. And when you say the circumstances --

THE COURT: Could you hand that up so I can look at it?

MR. TREININ: Oh, certainly.

THE COURT: Continue, Mr. Treinin.

BY MR. TREININ:

Q. In the circumstances of that time, what are you referring to?

A. Well, we had a time of great strife. It was not always physical, but there was some physical strife in our country, and there had been internal civil conflict. The Viet Nam war had become a questionable situation in the minds of many people, and the degree of question varied with people's particular interest in it and philosophy about it. This had pervaded schools in some parts of the country, including the schools in which at that time I worked, to the point of their sometimes disruption, sometimes interference with attendance in the schools. At a slightly earlier time there had been burnings. It was not a quiet time in America, and this had become a big issue. One president of the United States, as I recall, as best we can ascertain it, on this issue had left his office or had concluded that he should not

continue in another term. There was great turmoil with respect to this question.

Q. When you mention disruption of the school, are you referring to physical disruption alone?

A. No, I am not. I am referring to all sorts of disruption.

Q. Would you name them and explain them?

A. Well, if you were to piece them into two, there is the one that we have referred to first of all, which had to do with physical disruption largely. However, in physical disruption, and in the classroom teaching, in the things that went on in our colleges and universities, there also were disruptions in the teaching process itself. Some people chose the opportunity to use their classrooms, which might not necessarily have been designed for this particular issue, to present all sides of the issue, and you might say that that was a form of disruption of the educational process normally expected. Some would say that that is a positive disruption, that at such a time a teacher should attempt to weld into his or her teaching these important happenings of the day and, hopefully, relate them to whatever he was about in the more normal circumstances. There were also cases in which teachers tried to use their office to influence young people in a particular direction. They were sometimes quite overt, and there are cases across the United States, including

the city in which I worked, where it was necessary to admonish the faculty as to the importance of staying as neutral as possible, despite one's personal views, in handling such questions in the classroom.

Q. You mentioned the word "neutral", will you explain the importance of that in the educational context?

A. Yes. I believe it goes back to the earlier comment that I made, that as a teacher I have no right to prevail upon the students with my own personal opinions, without giving them the opportunity, as best I am able, to view the other thoughts on it, to exercise their own thinking, to ask questions which may be pertinent to their own perceptions which may be quite different, to their own family background, to their own community background, and how that community feels about issues, and at that particular time I am the servant of the children in that class. That is the type of education they deserve and should expect from me.

Q. You used the phrase "a teacher is the servant of the class"; would you explain a bit further?

A. He is there for no other reason, most directly, than to serve the interests of the children in the class, and by that service, of course, to serve those other facets of society, present and future.

Q. In the context of the situation we are discussing, you

have already mentioned the interest of the students; would you elaborate on that if you care to?

A. Well, in the context of what I have just said, the interest of the students I think should be called -- let me say, the attention of the student should be called to an important national event in a way that will afford him the opportunity to learn what the elements of the question are, and to again express himself -- I think this is quite redundant really -- to get his questions asked and answered with respect to it.

Q. And in reference to the Johnson memorandum, is it in conformity with the code of ethics adopted by the Teachers Association in conjunction with the State School Boards Association?

A. It is completely consistent with those statements, as I understand them, again going to the business of presenting all points of view on the particular subject, particularly a controversial issue.

Q. Now, we are concerned with a black armband, which has been described as about two and one-quarters or two and a half inches in width, worn on the arm of the plaintiff. Would you give us your opinion as to the use of symbols in the classroom?

A. I think it has been accepted that symbols speak for themselves. I think the oldest cliche is that a picture

is worth a thousand words, and in that respect, there have been symbols historically that have meant different things at different times. An armband or any other symbol must be viewed within the context of a particular situation. I know that some people construe armbands, and when I was a little boy this was the case, a black armband was traditionally worn in the country town from which I came as evidence of mourning in the family. That doesn't seem to be a part of the context today. But other symbols and signs have meant different things. The cross, which is ordinarily revered in the Christian community, has been a sign of fear historically in a number of occasions. For example, there is a transition in the nation of Spain from one of belief in God to one of inquisition. It meant quite a different thing in a short period of time, and we could give other examples of this. I guess the Maltese Cross is an example of another cross used in this fashion. In the areas of Lorraine, the Cross of Lorraine meant different things at different times. It became a sign of hope for liberation, and was carried secretly in France to be shown to other people; it had a definite meaning. It meant something else to the Germans. That is symbolism, generally. The black armband in this particular situation I think had a particular connotation. It was widely

recognized for what it was published as meaning, the idea that people were protesting the Viet Nam war. It started with massive mourning for those who died in the war, but it also meant opposition to the war. It was a political symbol, in my opinion. It said very clearly that when I wear this I am opposed to the Viet Nam war, and it was so advertised.

Q. Would you tell us, was it good educational practice for any teacher to wear that armband on moratorium day in a high school classroom?

A. I think it was very, very poor pedagogy.

Q. Assuming that the plaintiff wore this armband in an English class in which he was teaching poetry to youngsters fifteen, sixteen and seventeen years of age, that he made no statement covering his reasons or his purposes in wearing the armband, would the wearing of the armband by itself, in your opinion, be a disruption of the educational process?

A. I have just described what I thought the educational process should be. The wearing of the armband in that context took away almost every right that I have described from those children. It didn't give them the opportunity to question. Supposedly, this was a class in poetry. Children are dependent on the teacher for many things, including a grade. A man walks in or a woman walks in

with this particular symbol, which is pretty well known to varying degrees to the students in the class for its connotation, and says just one thing to them, 'This is the way to go, I go this way', as you view me, and if I am friendly to you, I see in that your friendliness for a particular cause. I, with my perception as a student, may view it quite differently. I may have family, I may have lost family in that war, I may feel that our Government is doing its very best at that particular time to end that war a particular way. I am given no opportunity to examine those tenets, it's as though I walked in there and orally said, 'You should be in favor of the immediate cessation of the Viet Nam war.'

Q. Do you draw a distinction between the symbol, the silent symbol representing that idea, and the oral presentation of that idea?

A. There would be little distinction in terms of what I said, but properly presented -- had the teacher come into the classroom and had he followed the advice of the Deputy Commissioner, as had been transmitted to the schools, and presented the sides of the issue orally or had he used the armband to instigate a discussion of the aspects of the issue, I think that I would feel differently about the situation.

Q. After the first moratorium day, Mr. James was invited to

come back to the school if he did not engage in political activity, the Board made it clear that in its opinion the wearing of the armband constituted political activity. He came back for the interim period between the two moratorium days without any incident, without discussing with any administrator any aspect of the wearing of the armband, and without saying further appeared on the morning of the second moratorium day wearing the armband. Now, if he were to appear before students on that second moratorium day, after widespread publicity and discussion in the press and among the citizenry and the students, can you tell us whether, in your opinion, the wearing of the armband on the second day would be a disruption of the educational process?

A. I think to a greater degree than the first instance. In the first instance the teacher might have claimed that he had a right to self expression, that that was what he was attempting to do, speak for himself, even though I have said that that is poor pedagogy. The second time the governing body in his district had clearly delineated what it meant and their responsibilities for the conduct of education in those schools. They had said to him, if he didn't believe this the first time, that this is a political act, he had been told this, and having been told that then, of course, he simply compounded

the error of the first time. The second time could scarcely be construed as an error, but as a direct refutation of the policy of the Board of Education and a contradiction of the direction he had been given.

Q. Let's turn to the role of an administrator. In a situation such as this on the first moratorium day, what, on the basis of your background and experience, would be the role of the administrator?

A. Well, he always had one of those roles, I described him in that group of people, including the teachers, between society and the children and citizens of the future, so he always had that obligation with respect to making sure that his teachers treated things, as best they could, in what would be an educationally defensible way, presenting sides of issues. That was always there. Now, in that particular setting, the highest educational officer in the State in charge of elementary and secondary schools had become concerned enough about the possibilities of disruption in the slassrooms, based on evidence that there had been and could be such disruptions, and such disruptions of the educational process --

MR. NEUBORNE: I object to Dr. Sheldon testifying to the motivation of the Johnson memo. He wasn't there when it was drawn up.

MR. TREININ: I was going to bring that up in my

next question.

MR. NEUBORNE: I suggest you do it now.

THE COURT: I will overrule the objection.

THE WITNESS: Simply attempting to -- well --

BY MR. TREININ:

Q. Continue, sir. Continue, I will rectify the situation.

A. All right. In this instance that office had apparently thought sufficiently of these things that it was necessary -- and this does happen periodically in a local school or any level -- the highest office of the State had thought enough of this situation that they felt it necessary to call it to the attention of all of the schools of the State, and there are two particular paragraphs in that memorandum that I think are pertinent to this discussion. The one was the idea of keeping a neutral point of view, and the second one was the one that we have here espoused considerably this morning, the idea of all points of view.

Q. The evidence indicates, Dr. Sheldon, that that memorandum, although dated before the first moratorium day, due to a logistical problem in your department, did not arrive at the school until the interim period. Turning your attention to the first moratorium day, based on the ethnics of the profession, based on sound pedagogical requirements,

would you discuss the role of the administrator in handling this situation on the first moratorium day without the Johnson memorandum?

A. All right. I assume you want me to address directly the case that occurred, what had occurred in that situation?

Q. That is right.

A. I have said generally what I feel the duties of an administrator are. Having been apprised of the fact that a teacher wasn't presenting different points of view with respect to a subject, as I understand it, the District Principal asked the teacher to come to his office and informed him that this was not in the best educational interest of the school and particularly of the children in the classes, and asked him to remove it. He did that obviously to forestall any educational disruption or possibly any physical disruption which might occur. In my opinion that was a wise move on his part, and part of his duties.

Q. In reality, did the Johnson memorandum add anything to the background of experience and action in regard to situations such as this?

A. I didn't know what -- you have told me that it did not arrive in the school district until sometime before the second of these events, but in effect, it was simply a

chief school officer in a state reaffirming the same things on which the local principal had acted.

Q. On the basis of your background and experience as a superintendent in school districts, would you comment on whether it is necessary or it is good educational practices in circumstances such as this for a district principal, for an administrator, to make up his mind on the basis of his knowledge whether physical disruption might result or whether he should take action to forestall it?

A. The answer is that that is a proper action. He knows the school, he knows the community, he knows the children, or she does if it happens to be a she, and it is proper then to act in any prudent manner to preserve good educational practice and to forestall any possible disruption.

Q. In other words, it is good educational practice to follow the admonition to prevent the fire rather than to put it out?

A. There is no question about that.

Q. On the basis of your background and experience, did Mr. James' wearing the armband materially or substantially jeopardize the interests of sound education?

A. I have no doubt of that. I think I have set forth why in my earlier statement.

Q. Would you explain the impact of the teacher as an author[illegible] figure in the classroom on this problem?

A. Yes. Teachers are viewed in a variety of perceptions but, generally speaking, a good teacher is held in good esteem by this students. It also usually involves him as the person who gives directions, has control of grades, and he is generally highly and positively regarded. There are exceptions to that, but we are talking about the good teacher. So there is a positive context associated with him normally. Now, depending on how he treats his class, they may or may not feel free to approach him on different times, on different occasions, with different kinds of questions. I think I said this earlier, if this man had normally taught poetry, and was expected to teach poetry, and people were in this particular context, if he came in with a political symbol, it could very well be that the children would not feel that they could approach him and say, 'What does that mean. why do you wear that today?' They are not expected to be the incidents of the educational discussion, although sometimes children are.

Q. Would you discuss the concept of exchange of ideas in the light of this situation?

A. Unfortunately, there are none, and the ideas then must be exchanged within the eye of the beholder, and each of

the children, looking at the teacher, will view that particular symbol in different ways in terms of his experience and, as a matter of fact, if a person had another view that did not rest with the child, he has also deprived him of an opportunity to examine that particular point of view. The child is left pretty much where he is and must focus his association of that symbol with that particular person. He is not being educated with that person.

Q. Would you also give us your views on the doctrine -- on the impact of this situation in reference to the indoctrination of the student?

A. If it is anything, I guess you would have to term it indoctrination, inasmuch as there is no opportunity for examination and rapport or discussion between teacher and pupil. It can't say anything else than what I have said it said, what I feel it said.

Q. Can you tell us whether or not this is good educational practice?

A. Very poor educational practice, and accepted as such.

Q. Will you give us, on the basis of your background, the effect of the use of symbols in the classroom as it tends to the polarization of the student body?

A. That is a matter of degree, of course. You would have to know the student body, you would have to know the

setting and the various things that I have said, but if we believe that our citizenry run along a particular curve, and that the children in a school run along that curve, holding different opinions to different degrees at different times, then the possibilities are there that those who feel negative to a particular symbol could be impelled to be offended, and then impelled either presently or at some time in the future in a particular direction. It presents the possibility of disruption.

Q. A teacher walks into the classroom with an armband on on moratorium day, in the context of our country's situation, with every intent that it be an expression of mourning and a sign of his personal grief; does that -- would you discuss whether or not of necessity it has the same impact on the thirty-five or forty children who are ranged before him?

A. No, it doesn't, and in this particular instance there were two concrete different instances that indicate that it did not. The first, I guess, the teacher felt that this was a symbol that meant something to him. Any teacher knows that -- I guess the term there is beauty is in the eye of the beholder, but Earl Kelly has written a fine little book on this very subject; it is on the subject of perceptions, and its title is Education For What Is Real, and what he attempts to point out there,

and it is very important for all teacners, is that you must attempt to teach from the viewpoint of the learner, that what it means to you in your construct is not particularly important, but what it means to the learner is the important thing, and so then in teaching you must attempt, and good teachers do this, to examine the feelings, the strengths, the weaknesses, the backgrounds of the people you teach, and then to present your material in view of their perceptions. So in the first instance, there wasn't any question, this wasn't opportunity wasn't there, it was simply poor teaching, and we have gone through the matters in the second instance. Since he seemed to have some doubt the first time that this meant something to him, that he was not concerned that it meant something to his class, the governing body, the educational body had said what it meant, which I think is a duty of theirs, and had told the administrators in this district that this is what it means, it is a political thing, and he had been told it is a political symbol, and at that point you are way out at the end of the plank because you now with full knowledge go in and teach what has been termed a political symbol.

Q. This class is statutorily mandated to attend school --

A. Well, depending on their ages.

Q. Yes. We are talking about eleventh grade English.

A. I don't know their ages in this classroom.

Q. Assume it is fifteen, sixteen and seventeen.

A. In that area some of them are mandatorily compelled.

Q. Would you describe the impact of the situation in relation to the fact that there is a captive audience?

A. Under the conditions they are a captive audience for that particular part of the instruction, that pertaining to the black armband. I don't know what else went on in the classroom in terms of the teaching of poetry. I would hope it had more of the essence of the type of teaching I have talked about, an examination of why people wrote particular things and what they mean from all points of view, which I understand is a good way to teach poetry and literature, but that particular part certainly did not fit into the proper educational context.

Q. Let us for a moment think in terms of the situation in a college classroom as compared to the situation in this poetry classroom, what are the differences from your point of view?

A. The elements are the same, the basic elements of good education doesn't change from stage to stage. However, the degree of maturity of the people being taught in the college is considerably different, so they might react differently in the situation. One might expect

that you would have in that classroom people who would on their own question. There probably was more feeling on the campuses and colleges and universities, more knowledge, more educated feelings about this issue of the day. In that context it is quite likely that people on their own would have examined the issue and brought on an educational discussion, whether it was intended by the teacher or not.

Q. The relationship between the student and the teacher is different in each case?

A. Yes, sir, it is.

Q. Sir, do you draw any distinction of an impact of a black armband with an armband that has another symbol imposed on it?

A. Well, any symbol is defined in terms of the context in which it is used, and so there are differences, they mean different things, society defines them for different purposes, people who wear them define them for different purposes and give them different meanings, and there are different degrees of importance attached to the symbol at different times by different people. So there are these differences, but in terms of educational implications, the basic substance is the same.

Q. What is the basic substance?

A. The basic substance is that if you don't do more than

simply wear the particular symbol, you have engaged in very poor education.

Q. As an educator, do you draw a distinction in the obligations of the teacher in reference to merely wearing the armband or going into a discussion of the armband, insofar as the indoctrination of pupils is concerned?

A. Yes.

Q. What is that distinction?

A. This, again, is good educational practice --

MR. NEUBORNE: I am sorry, I missed the last question, could you read the question?

(Thereupon the reporter read as follows:

"Q. As an educator, do you draw a distinction in the obligations of the teacher in reference to merely wearing the armband or going into a discussion of the armband, insofar as the indoctrination of pupils is concerned? A. Yes. Q. What is that distinction? A. This, again, is good educational practice -- ")

THE WITNESS: I want to finish that. What I started to say is that many teachers have

used rather bizarre methods to bring in symbols that are not commonly acknowledged, to use them to get the attention of their class on a particular day, perhaps a chain around the neck or something when teaching an issue that might be related to any kind of restraint. There are ways of getting attention, and having done that, then to base a lesson on it, and had this particular symbol at this time been used as the basis for an educational discussion, I would feel quite differently about it than the mere fact it was worn and no opportunity for discussion ensued.

BY MR. TREININ:

Q. In the absence of discussion, the mere wearing by itself affects the student?

A. It took away the rights of the student, the right of the student to question and to be informed, and to have the opportunity to see this in terms of his perception, maybe to have his perception changed by a good teacher.

THE COURT: Well, Mr. Treinin, I certainly don't want to interrupt, I am interrupting -- that is, aren't we going over the same

ground again and again?

MR. TREININ: I am just about ready to complete, just another question or two.

BY MR. TREININ:

Q. You have, on the one hand, a teacher who wants to express his grief on killing, the moral aspect of the war and, on the other hand, you have the student who has the rights as you have described them, on the basis of your background and experience, which is the more important in the context of the classroom, that the teacher in that situation express his grief or that the student have the full realization of the rights that you have described?

A. At the outset today I said the teacher was in the classroom to serve the students, and I firmly believe that, and this is one of the cases in which I think he must set his personal rights, which he might enjoy as a citizen outside, aside in the interest of good education of the children in his class.

Q. While he is in the classroom?

A. While he is in the classroom.

MR. TREININ: Thank you very much, Doctor.

CROSS EXAMINATION BY MR. NEUBORNE:

Q. Dr. Sheldon, you have no special knowledge of the Addison School District itself, your testimony today is based on your general perception of the schools throughout New York State?

A. Yes, and certain other particular specific things about Addison that would come to my attention in the normal course of events.

Q. You made no independent study of the facts of this case?

A. No.

Q. Your full knowledge of the facts of this case has been gleaned from reading the court opinions and discussions with the defendants in the case, is that correct?

A. That is correct.

Q. Did you ever discuss the facts of the case with Mr. James?

A. I never have.

Q. Or with me?

A. No, sir.

Q. When did you know you were going to be a witness here, Dr. Sheldon?

A. I don't know about here, but over a year ago, I believe it was in May of 1973 or thereabouts, we were asked whether or not we would be available to testify in a court situation.

Q. Do you feel any responsibility at all before giving

testimony in a proceeding like this to discuss the facts with the other side, to make sure that your perception of them is an accurate perception?

A. I did not.

Q. May I ask what materials were transmitted to you by the defendants in terms of your learning what the facts were in this case?

A. Yes. Materials which I had were the materials pertinent to the Commissioner's decision, which were sent to my office, and served as the background for the decision which was, as I understand it, appealed, and I then read a transcript with respect to what had occurred in the Court of Appeals.

Q. Did the defendants send you any notes or memoranda of what occurred?

A. Very brief. They were simply to indicate that here is the situation, and we would appreciate your appearing as a witness, see if you can get some people. He sent no personally written brief on the thing, no.

THE COURT: Did he send a letter to you?

THE WITNESS: Yes.

BY MR. NEUBORNE:

Q. Did the letter outline the facts at all?

A. Just generally referred to the materials which we had.

We had one conference; Mr. Brown, Mr. Treinin, myself, and members of our staff, with respect to the case.

Q. Did you read any material that was prepared at the time of the incident, for example, any memoranda that Mr. Brown might have made, any Board minutes, any discussions, any correspondence?

A. No, I did not.

Q. So that your knowledge of the facts of this case flows essentially from reading the legal papers before the Commissioner and from one conference with the defendants?

A. Of course, those do include the statements of Mr. James and the proposals that were set forth by his attorneys. I am talking about the Circuit Court case.

Q. You read the briefs in the Circuit Court case?

A. Yes.

Q. The record of the trial court?

A. That is correct.

Q. But just so that the record is clear, your testimony today is based not on any special investigation or special knowledge you have of the Addison situation?

A. That is correct. Except it was not brought out here and deeply explained because I was asked whether or not I was conversant with the basic facts of the situation, and through the readings, I am.

Q. I think at the outset of this cross examination I should

make it clear that cross examination is designed not to cast anyone in a particular light, but to make sure the record is as complete as possible, I assure you of that.

A. Thank you.

Q. The views that you have given us this morning are obviously deeply held views, and they are ones with which I have a great deal of sympathy. Stated in general, the problem with this case is applying what most of us would accept as generalities to the facts of the specific case. Now, would you concede, as Dr. Terino conceded yesterday, that there are experts in the field of education who do not feel that Mr. James having worn the armband so seriously violates notions of educational freedom and philosophy of education, as you set forth this morning?

A. There may be. I don't know how many experts have considered this particular case. But in the precepts that I have stated here today, I think you would find very little difference.

Q. In the general precepts, I couldn't agree more.

A. I don't know how many experts --

Q. With specific application to the case, do you know that Dr. Kenneth Clark has taken a position contrary to yours?

A. I read his deposition. I think he took a position rather

consistent with my own, as I read it.

Q. He did not come to the same conclusion you did with respect to the wearing of the armband?

A. Yes, he did. However, he attempted to repute different meanings to different symbols, and then interpret those in terms of what he felt were good and what were bad. I don't make that differentiation.

Q. This is a letter that I showed to Dr. Terino yesterday. It is in evidence as one of the letters in Plaintiff's Exhibit 4 and it is a letter written by Charles Davis, the Superintendent of Schools in Elmira, to Mr. James. Do you know Mr. Davis, by the way?

A. I do.

MR. TREININ: If the Court please, I was a bit remiss yesterday. That letter was introduced in a sheaf of letters on the question of damages, to show that Mr. James had made application to many places, and that was the only purpose that letter was introduced. Under the circumstances I claim that for the purposes that he intends to use it, based on the theory that he is using it for the same purposes yesterday, the letter is hearsay, and I have no opportunity to cross examine

Mr. Davis.

THE COURT: Mr. Treinin, this is cross examination. He can use a newspaper or -- could I see the letter?

MR. NEUBORNE: Yes, sir.

THE COURT: You represent -- there is no jury here, the rules are more relaxed -- you represent, Mr. Neuborne, that that is a letter from Mr. Charles Davis?

MR. NEUBORNE: Yes, sir, on the letterhead of the school system of Elmira.

THE COURT: You don't argue with that?

MR. TREININ: Of course not. I happen to know Mr. Davis.

THE COURT: He may use it for cross examination.

MR. NEUBORNE: Should we specifically mark this one? It is in a sheaf.

THE COURT: Yes.

MR. NEUBORNE: Can we mark it 4A so this can be kept in with the other letters?

CLERK: I was going to mark it Plaintiff's Exhibit 11.

MR. NEUBORNE: Okay.

(Thereupon letter referred to was

marked Plaintiff's Exhibit 11 for identification.)

BY MR. NEUBORNE:

Q. Doctor, I would like to read you, if I may, a paragraph from Superintendent Davis' letter to Mr. James, dated November 3, 1970. "I have followed your problem situation with considerable concern, and admit to being shocked by the Commissioner's ruling. Of course, I am not a lawyer but, frankly, I had expected a different approach in the ruling."

A. Would you read the rest of the letter so that I could get the full context?

THE COURT: Doctor, the questioner may proceed in anyway he desires. You may read it.

THE WITNESS: I thought it might be important to the record.

THE COURT: It is in the record.

THE WITNESS: Yes, thank you.

BY MR. NEUBORNE:

Q. Do you know Superintendent Davis, have you met him professionally?

A. Yes, I do. He is one of our district superintendents responsible to me.

Q. I take it this letter appears to express a slightly different approach to Mr. James' situation than the approach that you mentioned this morning?

A. It says that he was shocked by tne Commissioner's decision.

Q. Dr. Sheldon, are you familiar witn Commissioner Nyquist's opinion in this case?

A. Yes.

Q. You have read it, I take it?

A. Yes.

Q. Do you want a chance to look at it again for a moment?

A. (Witness examines document.)

Q. This opinion, of course, was issued in September of 1970, I take it that was before you came on --

A. That is correct.

Q. -- on staff?

A. Yes.

Q. Do your views differ from tne Commissioner's?

A. They do not.

Q. Would you say tnat the views tnat you testified to this morning are essentially in narmony with the Commissioner's?

A. Yes, sir.

Q. Do they depart from the opinion in any way?

A. I think not, not substantively.

Q. Have you told us anything this morning that you think the

Commissioner should have put in this opinion but didn't?

A. I think most of what I had to say with respect to children's reactions and their right to hear both sides of the question are implied there. I think I went into that matter more deeply.

Q. Now, in 1972, Dr. Sheldon, were you aware when the Second Circuit decided the first appeal in the James case? May of 1972, do you remember when it came down?

A. I'm not that familiar with the dates, and so forth. I became familiar with the fact that it had been decided, simply in a general manner that it had.

Q. Are you aware that the State Education Department petitioned the Second Circuit for rehearing in banc in connection with this decision?

A. No.

Q. I'm going to show you a letter that was written to the Second Circuit in connection with that in banc rehearing petition, and it is signed by John P. Jehu; do you know who he is?

A. He is an attorney in the office of counsel for the State Education Department, the immediate next in line to Counsel Stone, who heads the department.

Q. If I could impose upon you, would you take a look at this letter? Shall I mark that?

THE COURT: Let the doctor look at it.

MR. NEUBORNE: Could we mark this as Plaintiff's Exhibit 12 for identification?

THE COURT: Yes.

(Thereupon, letter referred to was marked Plaintiff's Exhibit 12 for identification.)

MR. TREININ: I would appreciate the opportunity to review it. I may have a copy buried in my briefcase.

MR. NEUBORNE: Certainly.

BY MR. NEUBORNE:

Q. Is there anything in this letter inconsistent with your testimony that you gave us this morning?

A. There is not.

Q. Would you think that this letter is a good exposition of what you told us this morning?

A. It is on the same premise. There is a legal argument in there that I didn't address.

Q. The educational position that is put forth to the Second Circuit is essentially the position you gave us this morning?

A. Dr. Davis seems to be saying that it drew certain conclu-

sions that were not based on the evidence, there was no evidence.

MR. TREININ: Pardon me, but from where I sit, I think you said Dr. Davis.

THE WITNESS: Mr. Jehu.

THE COURT: Mr. Neuborne, would you continue, please?

BY MR. NEUBORNE:

Q. Now, the aspect of your testimony that you laid the highest degree of importance on, and it is really at the nub of this case, is the obligation to present all sides of an issue in the context of public education. Now, it is the law in New York State and the practice in a great many school districts to begin each school day with the pledge of allegiance to the flag?

A. Correct.

Q. Do you know whether the State Education Department or you, in your capacity as an official, have given an instruction to teachers leading the pledge to give all sides of the issue in that situation?

A. I have had only one case of non-compliance come to my attention, and that was not in this State.

Q. Do you ever affirmatively notify students that they do not have to comply if they don't want to?

A. No, we don't, but further than what you have said about the pledge, the New York State Statutes also require that there be instructions in the meaning of the flag and of the oath. We assume -- I have not been informed that that instruction does not occur.

Q. Have you issued any regulations, notifying students that there is another side to the pledge of allegiance to the flag?

A. Well, I haven't, but if you examine what I just said and my previous statements, in that teaching, which is required by law, one would expect people would give the history of the flag and what it stands for. That is a requirement in the law, and consistent with good teaching one would expect they would examine the issue, yes.

Q. What if a student doesn't want to salute the flag, what do you do?

A. There are procedures with respect to his right not to salute the flag.

Q. Can he remain seated?

A. Yes.

Q. Does that have any educational impact on the students?

A. It probably does --,

Q. What about a teacher --

A. -- he is a student.

Q. What about a teacher who doesn't want to salute the flag?

A. A teacher is not required to salute the flag either. However, in the case which I referred -- all right --

Q. Go on.

A. I thought you were shaking your head. He is not required to salute the flag. However, it is required that the class be led in the pledge of allegiance, so arrangements must be made for that pledge to be led.

Q. What if the teacher sits quietly, while the class recites the pledge, at the front of the classroom, remains with her hands folded while the class recites the pledge, would you think that teacher is making some sort of a statement to the class?

A. Yes, I would.

Q. Would you think that statement is an effective statement if it is repeated every day?

A. Yes.

Q. Do you think a teacher has a right to do that?

A. Yes, it has been affirmed.

Q. Well, can you explain to me how that teacher -- let's not talk about legal rights, I think that is not fair to you because you are an educational expert.

A. That is correct.

Q. In terms of your philosophy of education, wouldn't that act by a teacher be in conflict with the philosophy of education that you put forth this morning?

A. Were this person a good educator, and were he not to participate in the pledge of allegiance to the flag, one would hope that he would use that also as a teaching device and explain to his children why he did this, and what the sides of the issue were.

Q. Do you mean if Mr. James had simply explained to the students that morning that this is a personal armband that I am wearing, you are free to agree or disagree with it, and if you would like to, I will discuss it with you after we finish English class, would that have been okay?

A. It would have been a move in the right direction. To discuss it after class is a tenuous type situation. I think rather than that, he would have discussed it with them then, he might not see them again during the day.

Q. Wouldn't that have been taking time out of teaching English?

A. There is nothing wrong with that to a degree, an important issue of the day. As a matter of fact, he could have tied that very nicely into various aspects of poetry and literature.

Q. So that as long as Mr. James had made some attempt to notify the students why he was wearing the armband, and if they had an opportunity, if they wished, to disagree with him, you would have no problem with his wearing an armband?

A. In the pedagogical sense, I would not.

Q. Do you know whether he was given such instruction or it was ever suggested to him that that would be an appropriate resolution of the problem?

A. I do not know.

Q. Do you know -- you were going to -- I think you mentioned in an earlier phase this case that when you were a superintendent of schools in Baltimore you had some experience with the flag salute?

A. Just one.

Q. Did you direct the teacher to lead the flag salute or not?

A. No, and the law there is slightly different. It is to the effect that the teacher must cause the pledge of allegiance to be recited. In this particular instance the teacher did not cause the pledge to be recited, either by an assistant or by a child leader. That is a slightly different thing, it is contrary to Maryland law. He was brought to my office and the law was explained to him as it existed.

Q. When we talk about all sides of an issue being presented to the students, I take it that we all concede that you cannot present all sides simultaneously, it must be done in a serial sense?

A. You can only do it to the best of your ability.

Q. You've got to present one side at a time, you can't express two ideas simultaneously?

A. To have the effect within a particular time context, it should be done simultaneously, as far as possible.

Q. Would it not have been possible to satisfy your philosophy of education by instructing Mr. James to make certain that alternative points of view were presented to the students within a reasonable time after having worn the armband?

MR. TREININ: I'm sorry, I don't hear you.

THE COURT: Keep your voice up.

MR. NEUBORNE: Would you read that back, please.

(Thereupon the last question was read by reporter.)

THE WITNESS: The reasonable time in that particular setting would have been within the time when this thing existed and had a meaning. It had to be, in my opinion, in that class period. To think that is a serial development, today I tell you that you ought to wear an armband, and maybe next week I'll tell you why you should or should not, doesn't fulfill the requirements

of the basic lesson.

BY MR. NEUBORNE:

Q. Let me tell you what the facts of this case were. Mr. James taught for about twenty minutes, halfway through the period, when he was called out to the principal's office and told to remove the armband. If he had been told at that point to go back in and tell them the other points of view, and if he did that in that same class period, would you have had any problem with your philosophy of education?

A. Probably not. This is -- again, I am talking about the pedagogy, not the political arguments involved there, but --

Q. I take it you did not agree with the political message that he was expounding when he wore the armband?

A. I may very well have agreed, but I don't think the school is the place to expound it. That message is carried well beyond that classroom.

Q. Do you know the size of the school at Addison, how many faculty members?

A. It is a small school, I don't know the number.

Q. We have evidence that it is about one hundred faculty, about eighteen hundred students.

A. Let me recharacterize it, in New York State it is a

middle-sized school.

Q. Did you know that Mr. James was the only faculty member that day to wear an armband?

A. The only one that was brought to my attention.

Q. The evidence indicates that he is the only faculty member to have worn the armband.

MR. TREININ: Not that it matters, but it happens to be that we talked about a member --

THE COURT: In the elementary school.

MR. NEUBORNE: It was the elementary school.

BY MR. NEUBORNE:

Q. Consistent with your desire to expose students to as many points of view as possible in connection with the educational process, don't you think that your own educational, philosophical precepts were advanced by allowing one faculty member out of one hundred to express himself strongly that day?

A. Not in the context as to how it was done, no.

Q. If you assume with me for a moment that the current events classes of this school were adequately dealing with the -- the social studies classes were adequately dealing with the problems raised by Viet Nam, and all points of view were being presented to the students within the context of the social study classes, would Mr. James'

having worn the armband in that situation been violative of your educational beliefs?

A. Were he the teacher?

Q. No, he is teaching English.

A. Yes, it would have violated the precepts I have set forth.

Q. The students would have had access to all points of view, wouldn't they?

A. You don't know that. These students were certain ages, certain grades, whether or not they enrolled in other classes we don't know. We don't know what their other exposures are. To me that was part of the problem, that you don't know what their perceptions were, what their experiences were.

Q. It is impossible to know what they thought when they saw that armband?

A. That is correct.

Q. Many of them might have understood it to be precisely what Mr. James meant that to be, just a symbol of mourning?

A. That is correct.

Q. I think you mentioned that -- what if Mr. James at the beginning of his class had said, 'I'm a Quaker, this is an armband that was made at our Quaker meeting, I wear it as a symbol of Quaker aversion to the loss of life and mourning for death.'

A. And now some discussion of this?

Q. Yes.

A. And openness, presenting the entire issue. Yes, I would have felt differently, that is correct.

Q. Do you know whether he was ever instructed to do that?

A. No, I do not.

Q. Did you know before you testified the genesis of the armband, the fact it was made at a Quaker Meeting?

A. I didn't know that until I read some materials pertinent to the case.

Q. The defendants never told you that?

A. As I told you, the defendants --

THE COURT: The materials he got were pertinent to the case.

MR. NEUBORNE: I misheard that, excuse me, your Honor.

THE COURT: Go ahead.

BY MR. NEUBORNE:

Q. I take it we have no quarrel with Mr. James' out-of-school right to be actively involved in political affairs?

A. None.

Q. Is it --can you imagine a situation where a teacher becomes so closely identified with a particular political point of view as to in effect in a community symbolize that point of view?

A. Yes.

Q. And would that teacher then going into the classroom teaching a lesson, even though all the students knew precisely what his beliefs were and what he thought very strongly, would that be poor educational practice?

A. No, I don't think so.

Q. Well, in terms of effect on the students, what is the difference between being taught by an English teacher whom you know very strongly is associated with a particular political point of view and who works very hard at that point of view, and being taught by a Quaker who simply wears an armband on one day?

A. In the second instance, the person engaged in a teaching act, in the first he did not.

Q. The impact on the students is the same?

A. I'm not sure about that.

Q. Even though the teacher has become a symbol of what he stands for in the community?

A. A symbol for whom? These are children in the classroom, coming from different homes, different atmospheres, different interpretations. When he comes into the classroom, he's got every right to bring himself in as a human being and as a teacher, and to go about the business of teaching in a way that is understood and accepted. Now, in the second instance you cited, he did

not do that. He went in and engaged in a teaching act. My presence does not put me into the teaching act.

Q. But I think we are clear that what we are talking about is the impact on the students, aren't we?

A. Yes, and what a teacher should or should not do in a classroom.

Q. The only reason we are concerned about what the teacher should do or shouldn't do in the classroom is because of the impact on the students?

A. That is correct.

Q. That is the critical function?

A. That is correct.

Q. I think that you have conceded that the teacher can become a symbol of an idea?

A. Yes.

Q. And that the impact on the students of being taught by that teacher will at least -- those students will know when they see that teacher what his beliefs are, what he thinks, what he feels?

A. If you are right, and these people have formed an impression of the teacher, then they have that impression and that teaching has already been done as a result of his external activities, so they are educated or miseducated in terms of that at that point.

Q. The impact --

A. That doesn't change when he comes into the classroom, that has already been done. Now, we have another situation, what does he do when he crosses the classroom threshold.

Q. What is the difference in the impact on the students?

A. A lot. If that same person now went in and began to profess his particular views as he espoused them in society, obviously that is negative. But if he simply walks in, he has not either abetted or in any way affected their impression, as the teacher. In the second instance, he has.

Q. I don't want to quibble with you, but I must confess that I fail to see the difference.

THE COURT: Let us have questions.

MR. NEUBORNE: Yes, your Honor.

THE COURT: Dr. Sheldon, a number of black teachers wear, I suppose nowadays, dashikis and other garb, indicating their black pride or that kind of symbol, what about that?

THE WITNESS: It is a matter of clothing and generally accepted.

THE COURT: It is not a symbol to you?

THE WITNESS: It is not a symbol.

THE COURT: As I understand it, other teachers

in other schools throughout the State on the same days wore black armbands, we have that in this case here. I don't know, has that come to your attention?

THE WITNESS: It has not come directly to my attention.

THE COURT: Of course, that would be for pedagogy. Do you know whether any other action has been taken in investigation of these affairs in other schools?

THE WITNESS: Well, no other charge to my knowledge has been brought, you see. Neither do I know that these people who wore them in the classroom did not use this as a teaching experience.

THE COURT: Now, you explained in your direct testimony that different symbols mean different things at different times, and I think we all agree with that. Now, what about the wearing of flag buttons, American Legion buttons, VFW buttons, and things of that nature, by teachers; do you have any bar to that sort of thing?

THE WITNESS: No, nor do you have a bar in that same general context of everyday situations

against a black armband. But if we were to choose one of those symbols, and let us suppose that -- and this did happen to a degree, remember the headlight campaign which went along with the moratorium days, that certain people were impelled to turn their headlights on to show that they agreed with the president; that became then a symbol that you and I would not associate with that action. But a flag, a VFW symbol, should it have been blown up in our country by the news media, et cetera, to mean a particular political thing, from some people's point of view, this would be the other end of the this same argument, and then I would expect that the same thing would occur, when it became well known in the populace and the schools and the department that this stood for a particular thing, then it has a connotation different than simply wearing an ornament that is at the moment uncontroversial.

THE COURT: Let us say that you have a teacher who usually doesn't wear any kind of

symbols or lapel buttons, and on moratorium day he wore the flag in his lapel. What would happen in that case?

THE WITNESS: There is no meaning associated with the flag.

THE COURT: No meaning?

THE WITNESS: There was none.

THE COURT: I find one, frankly, and I am the finder of the fact here. I would think under that context, under the public affairs and the report in the news that was going on, that that would indicate support for the administration in the war effort. You find none?

THE WITNESS: I absolutely disagree with you, Judge. Wearing the flag is simply an expression of my citizenry, and I might very well have been pro or con for the war, either aspect could have been taken.

BY MR. NEUBORNE:

Q You would have been offended if someone told you on that day that you could not wear that flag because they thought it meant something else than you thought it meant?

A. If it had been advertised widely, as was the armband, to have a particular different connotation than normally holds, I would impute something different to it, that is the difference.

Q. I take it though that you would apply - - you would hope that the same standards would be applied to pro-war symbols as they would be to anti-war symbols - -

A. In the context I have developed, yes, sir.

Q - - on the moratorium?

A. In the context I have developed, yes, sir.

Q Has it been your practice in the years that you have been an educator to observe whether teachers have worn religious ornamentation to school?

A. I have observed that they have from time to time.

Q. Do you find that in conflict with your educational philosophy?

A. Not unless you are talking about the whole matter of complete garb.

Q Let's start with that. How about a nun wearing her habit while she teaches a public school class without

attempting to indoctrinate, simply wearing the habit?

A. I would be negative to that particular thing, I think that is proscribed.

THE COURT: Mr. Neuborne is talking about - - that is proscribed by law - - what about educational practice?

THE WITNESS: Now, you must go to the - - educational practice, if the person did this, if it were legal, it would take a different context. If the person came in there, I would think that would be important that this person tell what their background was and why she wore the habit, what it stood for, yes.

BY MR. NEUBORNE:

Q. I take it that you agree it is important, at least highly desirable, that students know the background of their teachers, know what their general prejudices are, so they will be able to evaluate the teacher's output, is that right?

A. Generally speaking, yes.

Q. And Mr. James wearing that armband that day, wasn't he telling his students what he believed, so that perhaps when he taught Thoreau to them or Owen or any number of

English documents dealing with pacifism and war, they would be better able to evaluate his teaching?

A. No, all he taught them was what their perception of an armband was, he didn't contribute to their education.

Q. He didn't teach the same thing to more than one student?

A. He might have taught eighteen different things. He might have completely lost his stature in the child's mind whose brother had been killed or something, and he might have found consistency with another girl or boy. He did not educate them, he left them where he found them and caused then their opinions to remain formulated as they were when he came in.

Q. Suppose he had opened the class in Thoreau by saying, 'I'm a Quaker, a pacifist, I believe passionately in what Thoreau said,' and then went on to teach the lesson, could you tell me the difference between his doing that and wearing the armband?

A. As you described it, he was going to teach a lesson.

Q. Do you know what he was teaching that day?

A. No.

Q. Don't you think you would have been interested to find out, in terms of making a judgment?

A. I was interested to find out that he did know teaching in terms of the armband.

Q. Don't you think you might have wanted to talk to Mr.

James - - do you know what poet he was teaching?

A. No.

Q. Do you know whether he was teaching a pacifist poet?

A. No.

Q. Not relevant to your testimony today?

A. Yes, if he tied it in. I understand that he made no profession that that was the case when he was questioned by the principal.

THE COURT: Doctor Sheldon, wouldn't there be difficulty if he came into the class with the armband, and then explained to them the reason, based upon his religious beliefs, and he explained to them something about the Quaker meeting, and so forth, then he would be criticized for proselytizing a particular religion?

THE WITNESS: If he stopped there. But if he went on to teach the contrary, that there are people who have other beliefs, and probably your families, our community, may have other beliefs, so they saw they were not particularly affronted or aligned with that point of view.

THE COURT: That would be proper then in your view?

THE WITNESS: I think so.

BY MR. NEUBORNE:

Q. I think we were just talking about the garb that a person with religious sensibilities could appropriately wear in the school. You had begun to tell us about your feelings about the nun's habit. I think you said that - - stop me if I'm wrong - - that at least from an educational standpoint, that would be unobjectionable- - it wouldn't be objectionable as long as she was in pains to tell her class that it was a personal religious belief and she was not trying to impose it on them, and to make sure it was a non-indoctrinative education?

A. Yes, that she didn't go in too deeply why she wears the garb, I would say, yes.

Q. The wearing of a symbol, there are antidotes for it, aren't there? If the teacher talks about it and makes it clear that it is the teacher's own personal view, it is not inherently coercive, the fact she wears the garb, is it?

A. No. I said that several times, I think.

Q. Thank you, I didn't understand that. Thank you for repeating it. Just a few more questions, sir.

A. I guess in that previous question you did say that you made the explanation, did you not?

Q. Yes.

A. Yes.

Q. That is consistent with what you have said.

A. Fine, I didn't want to ascribe to the theory that the garb alone with nothing said didn't have meaning.

Q. You had no role in drawing up the Johnston memorandum, did you?

A. No, sir.

Q. As I recall, you were not even on the staff then?

A. That is correct.

Q. Do you know whether any school administrators, when they received the memorandum, telephoned Dr. Johnston's office for clarification?

A. No, I don't.

Q. Do you have a copy of it?

A. Not with me.

Q. Does it explicitly ban the wearing of a black armband by a teacher?

A. No, as I recall, it doesn't.

Q. Do you know whether Mr. James or members of Mr. James' family phoned Dr. Johnston's office for clarification?

A. Nothing in any of the materials that I have read indicates that was the case.

Q. Do you know he did not?

A. No.

Q. I am going to read you one sentence from the Second Circuit opinion, and ask you whether you know of any facts which would make that sentence inaccurate. "It does not appear from the record that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views." Do you know of any - - Have you spoken to any students, seen any documentation that any student felt differently about that?

A. Nor have I seen evidence that it did not.

Q. I asked you a different question, sir.

A. The answer is no, I do not know that.

Q. Do you know whether any investigation was carried on to determine what the students thought about this armband?

A. No, I do not.

MR. NEUBORNE: I have no further questions.

THE COURT: Mr. Treinin, anything else?

MR. TREININ: Nothing, your Honor.

THE COURT: All right, Doctor Sheldon, thank you very much.

THE WITNESS: Thank you, your Honor.

MR. NEUBORNE: Thank you, Doctor.

THE COURT: Any further evidence, Mr. Treinin?

MR. TREININ: No, your Honor.

THE COURT: Mr. Neuborne, do you have any rebuttal?

MR. NEUBORNE: Before I put the rebuttal case on, for the record, on the basis of the defendants' case that we have now before us, I think the plaintiff is entitled to summary judgment under the Second Circuit's opinion. I know you have taken it under advisement.

THE COURT: Now, we have had a trial here now, don't talk about summary judgment.

MR. NEUBORNE: In addition, I think they have utterly failed to present enough facts to go to the jury, were a jury present. I think that a directed verdict would be appropriate, however, in a - -

THE COURT: Mr. Neuborne, on that, I will defer ruling on your motions.

MR. NEUBORNE: At this particular time, as the plaintiff's rebuttal case, may I present to the Court the deposition of Dr. Kenneth B. Clark, which was taken pursuant to Rule 32, at his offices in New York City, with Mr. Treinin present, and with the expectation that it would be offered

as the plaintiff's evidence in this case.

MR. TREININ: First of all, I would like an acknowledgment, Mr. Neuborne, in view of the point that you made examining Dr. Sheldon, that Dr. Clark did not discuss the matter with me before the examination either.

MR. NEUBORNE: That is so. I think the record should reflect that Dr. Clark knew that he was going to be a witness about two weeks ago.

MR. TREININ: But there was no attempt to communicate with me.

MR. NEUBORNE: I think that is correct. I stand chastised.

MR. TREININ: I did not mean to chastise you, sir.

THE COURT: He used a strong word.

MR. TREININ: Your Honor, there may be some objections that I have to some of this.

THE COURT: Why don't you do this? Let us say, as to the procedure, you don't object to that. As far as your reserving objections, I will permit you to set forth

whatever objections you have in writing.

MR. TRAININ: Thank you, sir.

MR. NEUBORNE: At the close of the Plaintiff's case - -

THE COURT: The evidence is closed.

MR. NEUBORNE: There is one brief point of law that I think I should raise. The jurisdictional allegations in the complaint make it a 1983,1343 classic civil rights case. The jurisdictional allegations in the complaint are brought as a classic civil rights case, 42 United States Code 1983 and 28 United States Code 1343(3). At the close of the evidence, given the evidence that has been presented here, I think it is appropriate to suggest to the Court that there is an additional jurisdictional basis under 28 United States Code 1331(a), in that it is a question arising under the laws of the United States, an allegation of damages in excess of $10,000 most recently before the Court. Therefore, the Court would have jurisdiction both on the Federal question and

civil rights.

THE COURT: That is made part of the record. Now, Mr. Neuborne and Mr. Treinin, certainly, as far as parts of the record here, we have Circuit Court decision, and we have Mr. James' testimony. Prior affidavits were part of the record. However, we had additional matters here, that is, Mr. James' detail, which was submitted in a very summary fashion, of his loss of wages and also whatever should be counted by way of mitigation, and now we have had the additional testimony of Dr. Terino and Dr. Sheldon and Dr. Clark as to what impact that may have on the case. It certainly would be helpful to me if I had your written positions on the facts and also as to what law to apply under the circumstances. Now, I have talked to Mr. Knisley yesterday, and do I understand that you think it would be helpful if I had the record?

MR. NEUBORNE: Most certainly.

THE COURT: Mr. Noel, you and Mr. Knisley have talked. Now, unfortunately, Mr. Knisley's

doctor has put him on the shelf. But he did not participate very much, and he thought he could get that part out. We will do it as quickly as we can, and after we have the record, how long would it take you to get the information I need, in good fashion?

MR. NEUBORNE: Would you want proposed findings of fact?

THE COURT: Yes, that would be most helpful, proposed findings of fact, both sides.

MR. NEUBORNE: It would take me two weeks after receiving the record.

MR. TREININ: May I have the same time after - -

MR. NEUBORNE: I had hoped we could do it simultaneously.

THE COURT: Mr. Treinin, let me say this. I find in this business that the best way to do it is to have attorneys tackle it right away, and then if there is any need - - usually, in this kind of a case you know what the other fellow's position is, and you can be ready to meet it right away - - but if, for example, we find there is something that

someone has not been able to handle, I will give you more time. But we will then expect that two weeks after we send to you the transcript, we will have your proposed findings of fact.

MR. TREININ: Just for the record, may I also make a motion on all the evidence that the case be dismissed on the grounds that the allegations of the complaint have not been proved nor any case has been proved, especially against the School District.

THE COURT: Mr. Treinin, I will defer ruling on that until I read the proposed findings.

MR. NEUBORNE: Should be have this marked, that is Dr. Clark's - -

THE COURT: That can be filed with the clerk. You may keep the exhibits, but when you send in your proposed findings of fact, please send to me your exhibits, because I need them when I review the briefs. The case is closed. Thank you very much.

MR. NEUBORNE: Thank you.

MR. TREININ: May it please this Honorable Court, the editors were discussing this morning what a beautiful day we had yesterday, and is there some possible way of making the tape available so that it could be used as an educational teaching device. I want to say that we all agreed - - I know Mr. Neuborne does - - that your Honor gave us yesterday a wonderful day in court. None of us will ever forget it, we so appreciate it.

THE COURT: Beware of Mr. Treinin before a jury.

MR. NEUBORNE: I am very happy that there is nobody sitting over there.

MR. TREININ: I know that your Honor won't misinterpret. Is there some way that the tape could be made available for copying?

MR. NEUBORNE: Well, we will have the transcript.

THE COURT: You will have the transcript. Why don't you take that up with Mr. Knisley, he is familiar with how it operates. Why don't you meet with Mr. Noel and he will show you Mr. Knisley's office, and you talk to him.

MR. TREININ: Thank you very much. It was a pleasure to appear before you.

THE COURT: Thank you both.

(Thereupon, the court was in recess at 11:20 a.m.)

* * * * * * * * * * * * * * * *

I hereby certify that this record is a true and accurate transcript from my stenographic notes in this proceeding.

Official Reporter
U. S. District Court

DECISION AND ORDER OF CURTIN, J., DATED NOVEMBER 18, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES,

Plaintiff,

-vs- Civil 1971-164

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

APPEARANCES: BURT NEUBORNE, Esq.
American Civil Liberties Union
New York, New York, for Plaintiff.

HARRY TREININ, Esq.
Corning, New York, for Defendants.

The plaintiff, a probationary teacher of eleventh grade English at Addison Central High School, was suspended for wearing a black armband to school on November 14, 1969, a Vietnam Moratorium Day. He returned to his teaching duties a few days later, but was again suspended when he wore a black armband to school

on another Vietnam Moratorium Day, December 12, 1969. He was dismissed on January 13, 1970 and, on September 23, 1970, the New York State Commissioner of Education upheld James' dismissal.[1] On April 14, 1971 the plaintiff filed a civil rights action pursuant to 42 U.S.C. §1983 in this district. The defendants moved on September 13, 1971 for a dismissal of the complaint and for summary judgment before the Honorable Harold P. Burke. By order of December 23, 1971, Judge Burke denied the plaintiff's motion for summary judgment and granted defendants' motion for dismissal of the complaint. Following appeal to the United States Court of Appeals for the Second Circuit, this action of the district court was reversed on May 24, 1972, 461 F.2d 566 (2d Cir. 1972), and the "case remanded for proceedings not inconsistent with this opinion." On August 12, 1972, while Judge Burke was on vacation, the parties appeared before me on plaintiff's application for a preliminary injunction reinstating the plaintiff to his teaching position for the school year 1972-1973. As the defendants had not obtained a stay of the order of the Second Circuit, I directed them to reinstate Mr. James. The Supreme Court

denied defendants' petition for a writ of certiorari on December 4, 1972 and the action was then returned to the district court, where it was assigned to the late Judge John O. Henderson's calendar on October 29, 1973. Shortly thereafter the plaintiff renewed his motion for summary judgment, which was pending upon Judge Henderson's calendar at the time of his death in February 1974.

In the Second Circuit decision of May 24, 1972, Judge Kaufman framed the issue in this case as follows:

> . . . whether, in assuming the role of judge and disciplinarian, a Board of Education may forbid a teacher to express a political opinion, however benign or noncoercive the manner of expression. We are asked to decide whether a Board of Education, without transgressing the first amendment, may discharge an 11th grade English teacher who did no more than wear a black armband in class in symbolic protest against the Vietnam War, although it is agreed that the armband did not disrupt classroom activities, and as far as we know did not have any influence on any students and did not engender protest from any student, teacher or parent. We hold that the Board may not take such action.

461 F.2d at 568.

When the parties appeared before me on plaintiff's motion for summary judgment, the defendants urged that the wearing of the armband by Mr. James caused disruption in the school and that they have an opportunity to prove it. For that reason the court set this case for trial, which was held on July 9 to 11, 1974. Following trial both parties submitted briefs on the law and facts which the court has considered carefully. The following constitutes the court's findings of fact and conclusions of law.

Many of the facts in this case are undisputed by the parties. None of the essential facts which Judge Kaufman gleaned from the papers submitted on the motions was contradicted by the evidence at trial. However, for completeness, the facts revealed at the trial before the court are set forth here.

In 1969 Charles James was employed as an eleventh grade English teacher at Addison High School, a public educational institution located near Elmira, New York. At that time the school was composed of about 1900 students and 100 teachers. Central District No. 1 is

primarily a rural school district with students coming from a number of surrounding towns. The Board of Education of the Central School District No. 1, of the Towns of Addison, et al., has control of public education in the Addison School District. In 1969 Robert Andrews, named as a defendant, was President of the Board of Trustees of Central District No. 1. Other members of the Board of Trustees in 1969 were Ralph Vena, Edward Linsler, Walter Mergler, Henry Gettstine, Charles Champlain and Thomas Lyons. Defendant Carl Pillard is, and in 1969 was, the Principal of Addison High School and was responsible for the day-to-day operation of the school. Defendant Edward J. Brown is, and in 1969 was, the District Principal of Central District No. 1 and was the chief executive officer of its school system.

Before teaching at the Addison school, Mr. James had previously taught English at Bainbridge High School in Bainbridge, New York for four years, and at Arturo Toscanini Junior High School in the South Bronx for two years. Prior to teaching English, Mr. James had served as a Methodist minister from 1955 to 1963. Shortly

after he ended his affiliation with the Methodist ministry in 1963, he began to attend the Quaker Meetings in the Philadelphia area where he was enrolled at Temple University. In 1967 when he was teaching in the New York area, he often attended the Friends' Meetings in Flushing. He continued his involvement with the Quakers when he moved upstate to Addison and attended the Elmira Meetings on a regular basis.[2]

THE NOVEMBER 14, 1969 ARMBAND INCIDENT

In September 1969 when James began to teach English to eleventh graders, he was assigned the normal teaching load of five classes. Prior to November 14, 1969 no one complained about his teaching ability. November 14, 1969 was observed as a Moratorium Day in protest over the Vietnam War. As that day approached, the Quaker Meeting in Elmira discussed means of observing it in a proper manner. They decided that one project to be undertaken was to make armbands and to distribute them among members of the Meeting. Two to two and a half-inch

wide, black armbands were placed on a table at the Baker Meeting House for those who wanted to take them.

James wore one of these armbands on the left arm of his sport coat when he arrived at 8:00 a.m. at the Addison High School for teaching on November 14, 1969. At about 8:10 a.m. Carl Pillard, the principal of the school, entered James' homeroom, appeared to notice James' armband, but did not mention it and advised James to ignore any students who might wear black armbands on that day. From 8:30 a.m. until 8:45 a.m., Mr. James conducted a homeroom session, at which nothing unusual occurred. Following the homeroom, he had a free period from 8:45 a.m. to 9:30 a.m., during which time he saw no students. At the second period, beginning at 9:30 a.m., James taught a poetry lesson to an eleventh grade non-regents English class and again there was no unusual behavior or incident.[3] In fact, during the entire course of the events of November 14, no student or faculty member complained to James or even mentioned the armband. He conducted his normal teaching routine and did not discuss the armband with any of the students in class. Midway through the second period, Mr. Pillard called James on the telephone,

asking him to report to his office. When James arrived there, Pillard asked him why he was wearing the armband. James responded: "Because I am against killing." Pillard then told James that he considered the armband a political act against the President of the United States and asked James to take it off. When Pillard refused James' request for time to think over removing the armband, James said he would leave it on. Pillard did not express any fear of physical disruption in the school, but did express anxiety over "getting calls from all the parents by noon." Pillard then sent James to the office of the District Principal, Edward J. Brown, who also asked James why he was wearing the armband. James told Brown that it was to demonstrate his opposition to killing and explained to him the Quaker Meeting and the background of his wearing the armband. Brown told James that he felt that the wearing of the armband had political connotations and that it was "contrary to the teachers' code of ethics, felt that it would be disruptive to the education process, and it might lead to further disruption and divisiveness among the teachers." Tr. at 207.[4]

When they could not reach an agreement about the armband, Brown suspended James pending Brown's seeking legal counsel and advice of the Board of Education. At trial Brown testified that he conceded that no physical disruption was caused by the armband wearing. He testified: "I would say that the discipline of the school was normal on that occasion." Tr. at 233. He received no student or parent complaints and knew of no interruption in the ordinary classroom day. At trial, however, Brown testified that in his opinion sound educational practice was violated by James wearing the armband because all known sides of controversial issues should be presented to students, while wearing of the armband gave only one point of view.[5] Brown also felt that the armband was out of place in an English class but, under proper guidance, might be used as a class illustration in a social studies class. After his conversation with Brown, James conducted his class to the cafeteria and left the building for home. On his way home, James stopped to see a Methodist minister friend and then went to the Quaker Meeting House in Elmira where he participated

in an ongoing prayer vigil.

On November 15, 1969 the Board of Education met to consider James' conduct, without notifying him of the meeting or giving him an opportunity to explain his position.[6] On the same day the Board sent James a letter confirming his suspension on November 14 for a "political act" and allowing him to return to class on November 17, 1969.[7] James returned to his teaching assignment on the 17th and continued teaching without incident until December 12, 1969.[8]

THE DECEMBER 12, 1969 ARMBAND INCIDENT

Because James did not consider the armband wearing a political act, when other members of the Quaker Meeting decided to wear black armbands on the December 12, 1969 Moratorium Day James did also. On the 12th, shortly after James arrived in his homeroom, Pillard came in and told him to report to Brown's office. At this time there were no students in the school, but Brown immediately suspended James and he left the building.[9] James requested

a hearing before the Board of Education. He was told that he could address the Board but would not be afforded a formal hearing. He decided not to attend the meeting of the Board which was held on January 13, 1970. The Board proceeded to discharge him from his teaching position in accordance with Section 3013(1) of the Education Law of New York.

In support of their position that the wearing of the armband was a disruptive act, the defendants called Edward Brown, the District Principal of the School System, Dr. Anthony Terino, Educational Advisor for the State Association of School Principals, and Dr. Thomas Sheldon, Deputy Commissioner for Elementary, Secondary, and Continuing Education in New York State. Neither Dr. Terino nor Dr. Sheldon had visited the school or talked with any students or teachers. Neither knew if other students or teachers had commented on the armband or had seen it. They derived their information about the incident from the papers filed in the case, the proceedings before the Commissioner of Education, and from discussions with counsel about the facts.

In his testimony Principal Edward Brown stated that he believed the act had political connotations regardless of James' motivation. Brown felt that the wearing of the armband was disruptive to the education process and might lead to further disruption among the teachers. No facts were elicited from him to support these opinions. In Brown's opinion, wearing the armband violated the code of ethics because, by doing so, James presented only one point of view on the war to the students. Dr. Terino agreed with Mr. Brown that the wearing of the armband was a form of protest against the war, and that the wearing of the armband presented only one side of an issue. Terino explained that the impact of the armband could not be measured because the reaction is an "internal" one. "The fact there are no physical protests does not make the wearing of any device that shows one side of a controversial issue, does not justify the use of that device." Tr. at 299. If Dr. Terino was the principal, he would have handled the problem in a different fashion. He would have told James: "If you insist on wearing your armband please take a day's leave

of absence and wear it outside the building." Tr. at 314. Although he recognized the fact that teachers throughout the state daily expressed opinions for or against the war policy of the Administration, the wearing of the armband took on special significance in his mind. He stated that it would have a greater impact upon students than the spoken word. He would approve a classroom activity in which the teacher gave his point of view and the students responded, as opposed to wearing the armband without discussion which prevented the students from presenting their viewpoint. He reacted in a different way to slogans; he testified: "A quotation of Peace With Honor doesn't conjure up in my mind as clearly as does the armband one side of a controversial issue." Tr. at 370. In Tarino's opinion, if a teacher by outside activities became so well known in the community to become himself a symbol of opposition to war, he could continue to teach in the school as long as he did not express his views there. He then put forth the unremarkable idea that the period of 1969 was one of controversy in America and that physical and other types of disruption had to

be prevented in the classroom. He said that the teacher had no right to prevail upon students with his own personal viewpoint without giving students exposure to other sides of the issue and the opportunity to ask questions. Dealing with the armband, he related that any symbol must be viewed within the context of the particular situation,[10] for example:

> The cross, which is ordinarily revered in the Christian community, has been a sign of fear historically in a number of occasions. It [also] became a sign of hope.

Tr. at 407.

In his view, the armband James wore symbolized protest of the Vietnam War.

> It started with massive mourning for those who died in the war, but it also meant opposition to the war. It was a political symbol, in my opinion.

Tr. at 408.

Sheldon characterized the armband wearing as "poor pedagogy" because it presented the viewpoint of the wearer, but did not give students an opportunity to respond. He would allow the armband wearer to instigate

discussion as long as both sides of the issue were presented and would not oppose the act if James had made some attempt to notify the students why he was wearing the armband and given them an opportunity to disagree,[11] but he did not know whether James had done this or whether he had been given an opportunity to do it.[12] He said that if someone who usually did not wear any symbol wore a flag on Moratorium Day, he would find nothing objectionable to that.

MR. JAMES' CONDUCT IN LIGHT OF THE FIRST AMENDMENT

The wearing of a black armband has been held to be a primary first amendment right akin to "pure speech." Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). In Tinker, the Supreme Court held that a school cannot bar or penalize students' constitutionally protected right to wear an armband absent "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513.

With respect to a teacher's wearing of an armband, the Second Circuit has stated:

> Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers. Although it is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence with a student than would those of students inter sese, that assumption merely weighs upon the inferences which may be drawn. It does not relieve the school of the necessity to show a reasonable basis for its regulatory policies.

James v. Board of Education of Central Dist. No. 1, et al., 461 F.2d 566, 571 (2d Cir. 1972)(emphasis supplied).

In this case, the defendants have fallen far short of their burden of proving that the interest of discipline or sound education was materially and substantially jeopardized by the events described. At his initial meetings with Mr. James, Mr. Brown was not concerned with disruption in the school, but with receiving phone calls from irate parents. Although defendants' witnesses

alluded to disruption, it is apparent that the classroom activity at the Addison High School continued at a serene pace throughout these Moratorium Days and that there was neither actual disruption nor the slightest threat of it. At best any threat of disruption was ephemeral and, in the words of Dr. Terino, "an internal one." The force of the testimony of defendants' witnesses is considerably diluted by their preoccupation with the armband, while refusing to recognise the impact of other symbols. While recognising that a number of teachers were probably wearing symbols in support of the Administration, they nonetheless chose to single out James' act as a violation of the code of ethics. In determining whether the code was violated, however, no attempt was made to interview any students or other teachers.[13]

It is not the characterization of an act protected by the first amendment, but its effect on the school environment, which allows the traditionally broad discretion vested in school authorities to evaluate teacher conduct "in light of special characteristics of the school environment." James v. Board of Education,

supra; Russo v. Central School District No. 1, Towns of Rush, etc., N. Y., 469 F.2d 623 (2d Cir. 1972). In fact, on the basis of the record this court would be inclined to characterize James' acts as religious, were such a characterization necessary to the resolution of this case.

Nevertheless, what is essential for the defendants to carry their burden of proof is some sort of showing of actual educational or disciplinary disruption. The defendants have not offered any such proof. Testimony about some vague internal disruptions or alleged acts of "poor pedagogy" will not suffice. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines School District, supra, at 508. Furthermore, it is evident that only symbols expressing one side of the war issue were deemed to be a prohibited political act.[14] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). See also Russo v. Central School District No. 1, supra. Since there is no showing that either "the rules formulated by school officials [are] reasonably related to the needs of the educational process [or] that . . . disciplinary action taken pursuant to these rules have a basis in fact," James v. Board of Education, supra, at 574, plaintiff's motion for summary judgment must be granted.

DAMAGES

Since the Board's action in dismissing Mr. James was constitutionally impermissible, Mr. James is entitled to compensatory damages in the nature of back pay. See, e.g., Connell v. Higginbotham, 305 F.Supp. 445 (D.C. Fla. 1969); aff'd in part, rev'd in part on other grds., 403 U.S. 207 (1970). The amount of back pay due to Mr. James is computed as follows: James' salary

for the remainder of 1970 would have been $4,504.50, for 1970-71 $10,780.00, and for 1971-72 $11,520.00.[15] This totals $26,804.50. The total of $5,840.25 was earned by James in mitigation.[16] The amount due James is thus $20,964.25.

The court also holds that this is a proper case for the awarding of costs and attorneys' fees. In Stollberg v. Members of Bd. of Tr. for State Col. of Conn., 474 F.2d 485 (2d Cir. 1973), the plaintiff's teaching contract was not renewed following his mailing fellow faculty members an invitation to participate in a Peace Program concerning the Vietnam War. Judge Mansfield wrote for the Second Circuit:

> The circumstances of this case persuade us that an award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication of their rights to do so in a court of law. Such a result would be destructive of the educational process in a free society. When, as here, the constitutional right is one of great importance and proof of an intentional and serious violation is clear and definite, enforcement should

not be inhibited by reason of litigation costs.

474 F.2d at 490.

The Clerk is directed to enter judgment in the amount of $20,964.25 in favor of the plaintiff. Costs are to be paid by the defendants. The parties shall attempt to stipulate to reasonable attorney's fees to be paid by defendants. If the amount of attorney's fees cannot be stipulated to within sixty days, the plaintiff may apply, upon notice to the defendants, with a detailed statement of services, for the court to set a reasonable fee.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: November 18, 1974

FOOTNOTES

1. For a discussion of Commissioner Nyquist's decision, see the Second Circuit opinion, 461 F.2d 566, 570, n.7 and accompanying text.

2. Because James' religious convictions play an important role in the resolution of this lawsuit, the court shall consider in some detail James' religious affiliations. He characterized his association with the Friends in Flushing as a regular attender. He explained to the court that he was never a member of the Flushing Meeting; that the Flushing Meeting was a very prestigious Meeting "and it wasn't the kind of place I would even thought about asking for membership until I had been there many years." (Tr. at 32.) James further testified that in most Friends Meetings there are more attenders than there are members. Id. In 1969 when the James family came upstate, they attended the Elmira Meeting on a regular basis. Subsequent to the armband incident, James became a member of the Elmira Meeting. (Tr. at 33.) This was in his second or third year of attendance. (Tr. at 101.) The context of James' armband decision is important because the court rejects defendants' implication that it was not an individual decision. Defendants propose that the court find that "[p]laintiff allied himself with those who felt the war was wrong." The court rejects such a finding as it is not based on the testimony. As James carefully pointed out, "[t]he original roots of [Quakerism's founder's] conscience were those of non-violence. This isn't the root of any other American religious group." (Tr. at 106.) Mrs. Dee, an attender at the Elmira Meeting in 1969 (subsequently a member) buttressed James' testimony concerning his religious motivations. "We all were wearing armbands, we all were doing everything that we could to make a peaceable statement of our deep concern." (Tr. at 151.)

3. The students were participating in class. When James was called to go to Mr. Pillard's office, the

class was orderly and, when James subsequently was asked to go to Mr. Brown's office, he checked his class and found them quiet and well-behaved.

4. Defendants have asked the court to find that "[d]isputes over the wisdom of the war disrupted and divided the country. It was a period of great trauma and tension." The court refuses to so find. What is relevant to this lawsuit is whether there was an atmosphere of tension or disruption during this period at the Addison High School. There has been no testimony in support of a finding of either at Addison.

5. If Brown had asked James to inform the class that wearing the armband was strictly personal and that the class was free to disagree with it if they desired, James testified he gladly would have done so.

6. The memorandum of Brown's November 14 conversation with James, provided to the Board, did not mention any of the Quaker motivations underlying James' decision to wear the armband.

7. The letter in full read:

> The Board of Education of Addison School District has conferred with counsel and very thoroughly discussed the facts of your situation. The Board has, unanimously, confirmed the action of District Principal Edward J. Brown regarding your suspension on Friday, November 14, 1969.
>
> The Board deems your action to be a political act. As such, it is prohibited in the School. It is, also, deemed unethical action on the part of a teacher to engage in such activity.
>
> You may return to class on Monday, November 17, 1969, with the understanding

> that you engage in no political activities while in the School.
>
> Of course, the Board recognizes fully your absolute right to express outside of the School any beliefs that you may have.

8. In James' view, his wearing the armband on November 14 did not in any way affect his ability to carry out his teaching duties on November 17. In fact, James testified that he taught without incident until December 12, 1969:

> Q. In the period of November 17th through December 12th, did you receive any complaint from any student or teacher concerning your having worn the armband?
>
> A. No.

(Tr. at 58.)

9. Defendants attempt to argue that the Second Armband Incident would be more disruptive than the first because of the widespread publicity the First Incident received. That argument is unacceptable under these facts. On December 12, 1969 James saw no students.

10. It is interesting to note that Dr. Sheldon did not perceive the wearing of dashikis and other black garb as a symbol to black students.

11. Sheldon would have no trouble with James' act if he had said, "I'm a Quaker, this is an armband that was made at our Quaker meeting, I wear it as a symbol of Quaker aversion to the loss of life and mourning for death," and then allowed discussion. Tr. at 442.

12. It is clear from the facts that James did not have such an opportunity. See, e.g., n.5, supra, and accompanying text.

13. Furthermore, there was substantial evidence in the case that the opinion of defendants' experts did not coincide with the viewpoint of other well regarded educators. Dr. Kenneth B. Clark, president of the Metropolitan Applied Research Center, Distinguished Professor of Psychology at the City College of the City University of New York, and member of the New York State Board of Regents deposed testimony was offered by plaintiff. Dr. Clark testified that, in the absence of evidence that a symbol is used by the authority-figure teacher to intimidate or psychologically coerce a student, he had no objection to the symbol on either educational or psychological grounds. "Not only would I not have any objection, but I would think that this is within the rights of the human being." Clark Deposition at 12. Dr. Clark also discussed the armband as a symbol in relation to other symbols. He stated that the armband was no more inherently disruptive "than the fact of a teacher wearing an American flag in the lapel . . ., or a teacher wearing a cross on a chain, or a teacher wearing a cross of David on a chain." Dr. Clark characterized all of these as "symbols of an individual's concern." Id. at 10.

Charles E. Davis, Superintendent of the Elmira City Schools, intimated that he did not concur in the views of his Addison colleagues in his letter to the suspended Mr. James regarding employment.

> I have followed your problem situation with considerable concern and admit to being shocked by the Commissioner's ruling. Of course, I am not a lawyer, but frankly I had expected a different approach in the ruling.

Plaintiff's Exhibit 11.

DECISION AND ORDER OF CURTIN, J., DATED NOVEMBER 18, 1974

14. See discussion of Dr. Terino's testimony on "Peace With Honor" signs and Dr. Sheldon's comments on flag lapel pins, supra.

15. For 1970-71 and 1971-72 there is a dispute over which level of pay James is entitled to. For the M-3 level, a teacher has to show certification and a substantial degree of graduate work. "A Master's degree, which apparently qualified him for permanent certification in New York State, certainly would be acceptable." Tr. at 265. Mr. James has a Master's Degree in Education from Elmira College. The only requirement he did not fulfill for this so-called "horizontal transfer" is filing the declaration of intent. However, in those years Mr. James was not in school to make those applications. Therefore, the court finds that he is entitled to the M-3 level of pay for the years in question.

16. Amounts earned in mitigation have been computed by totaling income James earned from January, 1970 to August, 1972 during the regular school year and considering only daytime employment.

Earnings Applied in Mitigation

1.	Substitute teacher, Horseheads Central School - 11/3/70; 11/12/70; 12/3/70	$ 75.00
2.	English class, Corning Community College 1/70 - 5/70	660.00
3.	Substitute teaching, Elmira School District - 12/70 (3 days)	84.00
4.	Part-time laborer, Werner-Sallie 1/70 - 6/70 (3/4 during school)	1,391.25
5.	Part-time English teacher, Ithaca College 1/71 - 5/71	3,000.00
6.	Substitute teacher, Horseheads Central School 5/28/71; 6/10/71	60.00
7.	Substitute teacher, Horseheads Central School 3/6-3/16/72; 3/20-3/23/72; 4/27/72; 4/28/72; 6/6/72	570.00

JUDGMENT APPEALED FROM, DATED NOVEMBER 19, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES, Plaintiff -vs- THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1, Defendants	JUDGMENT Civ-1971-164

This action came on for hearing before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED and ADJUDGED that the plaintiff, Charles James, have judgment against all the defendants named herein in the amount of Twenty Thousand Nine Hundred Sixty-Four Dollars and Twenty-Five Cents ($20,964.25) and his costs of the action.

Dated at Buffalo, New York, this 19th Day of November, 1974.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

NOTICE OF MOTION TO CORRECT JUDGMENT.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

CHARLES JAMES

-vs- Civ-1971-164

THE BOARD OF EDUCATION OF CENTRAL
DISTRICT NO. 1 of the towns of
Addison, Cameron et al.

PLEASE TAKE NOTICE that the undersigned will move before the Honorable John F. Curtin, on December 9, 1974, at the United States District Courthouse, Buffalo, New York, for an order, pursuant to Rules 59(e) and 60(a) FRCP, correcting the judgment entered herein on November 19, 1974, by adding a reference in such judgment to reasonable attorneys fees and appropriate interest accruing prior to the date of said judgment. A copy of plaintiff's proposed judgment is annexed hereto.

Dated: New York, New York
November 27, 1974

yours, etc.

Burt Neuborne
New York University School of Law
40 Washington Square
New York, New York 10012

To: Clerk of the Court
United States District Court for the
Western District of New York
Buffalo, New York

Harry Treinin, Esq.
11 East Market Street
Corning, New York

PROPOSED CORRECTED JUDGMENT, ANNEXED TO NOTICE OF MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES, Plaintiff -vs- THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LIN LEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1, Defendants	PROPOSED CORRECTED JUDGMENT

This action came on for hearing before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED and ADJUDGED that the plaintiff, Charles James, have judgment against all the defendants named herein in the amount of Twenty Thousand Nine Hundred Sixty-Four Dollars and Twenty-Five Cents ($20,964.25), together with the costs of the action, reasonable attorneys fees and interest accruing prior to judgment.

AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES

-vs-

Civ-1971-164

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of Addison, Cameron et al.

BURT NEUBORNE, being duly sworn, deposes and says:

1) I represent the plaintiff herein and I make this affidavit in support of plaintiff's application to correct the judgment originally entered on November 19, 1974, a copy of which is annexed hereto as Exhibit 1.

2) Plaintiff seeks two corrective entries on the judgment as initially entered:

a) First, plaintiff requests that the judgment be corrected to reflect the award of reasonable attorneys fees by the Court. Of course, the precise amount of the awarded fees remains to be computed in accordance with the instructions of the Court.

b) Second, plaintiff requests that the judgment be corrected to reflect the fact that, under governing New York law, damage awards for back wages entitle a prevailing party to interest on the amounts due from the date the plaintiff's cause of action accrued. Accordingly, plaintiff is entitled to interest on his unpaid back wages from the dates on which the wages were originally due and payable. A proposed calculation of the appropriate interest is annexed hereto as Exhibit II.

B. Neuborne

AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION

Laura Sager

Sworn to before me this 27th

day of November, 1974.

LAURA SAGER
NOTARY PUBLIC, State of New York
No. 31-4536756
Qualified in New York County
Commission Expires March 30, 1975

EXHIBIT I, ANNEXED TO AFFIDAVIT OF BURT NEUBORNE--JUDGMENT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES, Plaintiff -vs- THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMPBELL, PATTERSON, TUSCARORA, WOODHILL, THURSTON, ERWIN, LINDLEY and CAMPBELL; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDRIWS, President of the Board of Trustees of Central District No. 1, Defendants	JUDGMENT Civ-1971-134

This action came on for hearing before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED and ADJUDGED that the plaintiff, Charles James, have judgment against all the defendants named herein in the amount of Twenty Thousand Nine Hundred Sixty-Four Dollars and Twenty-Five Cents ($20,964.25) and his costs of the action.

Dated at Buffalo, New York, this 19th Day of November, 1974.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

EXHIBIT II, ANNEXED TO AFFIDAVIT OF BURT NEUBORNE--CALCULATION.

Plaintiffs' Proposed Calculation of Interest Payable on Accrued Wages found Due and Owing to Charles James

(1) Amounts found due and payable for wages which should have been paid during the 1969-1970 school year $4,504.50

(2) Interest on unpaid wages as of the end of 1970 (.03 (1 year) x 4,504.50) . . . . $ 125.14

(3) Amounts found due and payable for wages which should have been paid during the 1970-1971 school year . . . . . $10,780 —

(4) Amounts due and payable for wages and accrued interest as of the end of 1971 . . . . . $15,409.64

(5) Interest on sums unpaid as of end of 1971 (15,409.64 x .06) . . . . $ 924.59

(6) Amounts found due and payable for wages which should have been paid during the 1971-1972 school year $11,520

EXHIBIT II, ANNEXED TO AFFIDAVIT OF BURT NEUBORNE--CALCULATION

(7) Amounts due and payable for wages and accrued interest as of the end of 1972 . . . . . $ 27,854.23

(8) Interest on sums unpaid as of the end of 1972 (27.854.23 x.06) . . . . $ 1,671.25

(9) Amounts due and payable for wages and accrued interest as of the end of 1973 . . . . . $ 29,525.48

(10) Interest on sums unpaid as of the end of 1973 (29,525.48 x.06) $ 1,771.53

11) Amounts due and payable for wages and accrued interest as of November 19, 1974) . . . . . $ 31,297.01

12) Interest on sums unpaid as of the date of entry of the judgment (31,297.01 x.06 x 11/12) . . . . . $ 1,708.81

13) Total pre-judgment interest payable to plaintiff $ 6,088.32

14) Commencing November 19, 1974, interest at the rate of 6% commences to run

EXHIBIT II, ANNEXED TO AFFIDAVIT OF BURT NEUBORNE--CALCULATION

on the judgment of $ 964.25, plus the accrued pre-judgment interest of $ 6,088.32

New York, New York
November 26, 1974

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES,

Plaintiff,

-vs-

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY, and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

AFFIDAVIT

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF STEUBEN)

HARRY TREININ, being duly sworn, deposes and says:

1. I am the attorney for the defendants herein and make this affidavit in opposition to plaintiff's application to correct the judgment entered in this matter on November 19th, 1974.

2. In his complaint, plaintiff did not seek interest, Neither does the judgment, as entered, grant interest.

It is submitted that the New York Courts do not grant interest in situations such as presented in this case.

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

In Gordon vs. Board of Education, 52 Misc. 2nd, 175, the petitioner, a teacher, was reinstated to his position with the Board of Education pursuant to Court order. It was directed that he be paid his full salary for the period of his suspension. The direction, as in our case, made no provision for the payment of interest.

The Court held that the petitioner was not entitled to interest.

The Court determined that any restitution or damages granted to the petitioner was incidental to the primary relief sought by the petitioner, which in that case as well as in ours, was reinstatement. The Court held that the petitioner had no cause of action for back pay independent of his proceeding for reinstatement and could not maintain an action therefor until he had proven his right to that relief.

It is submitted that that case is determinative of the issue in our case and that under the circumstances interest cannot be awarded.

3. Interest, if awarded, cannot be in a rate in excess of three per cent. General Municipal Law, Section 3A.

Subdivision 3 of that section specifically provides that a municipal corporation includes a school district.

See Decker vs. Dundee Central School District, 4 N.Y. 2nd,462 p. 464.

Adler vs. Board of Education, 33 Misc. 2nd, 789, affd. 18 AD 2nd, 1053.

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

It is submitted that counsel also errs in his manner of computation. He has taken each individual year's earnings and computed the interest thereon; then, after adding the next year's earnings, computes the succeeding year's interest on the entire previous amount.

In effect, he is charging interest on interest. Such a procedure is not favored by the Courts of New York State. 2 N.Y. Jurisprudence, p. 21.

As a general proposition, compounded interest is not favored by the Courts.

Young vs. Hill, 67 N.Y., 162

Brown vs. Knapp, 79 id. 136

Ellis vs. Sullivan, 241 Mass. 60; 134 N.E. 695

Cherokee Nation vs. United States 270 U. S. 476

Matter of Schuster, 167 Misc. 194 modified on other grounds, 257 AD 55, affd. 284 N.Y. 569

Levine vs. U. N. Cleaners 4 AD 2nd 955.

Interest should not be compounded.

Williamsburg Savings Bank vs. Town of Solon, 136 N.Y. 465.

Seymour vs. Spring Forrest Cemetery Association, 4 App. Div. 359, p. 367, affd. 157 N.Y. 627

Granite Auto Leasing Corporation vs. Jeff Marr Bus Leasing Corp. 44 App. Div. 2nd 552, p. 554.

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

5. It is submitted that no action amending the judgment to provide for attorneys fees can be considered, absent a determination as to the status of the New York Civil Liberties Union and the American Civil Liberties Union Foundation, Inc. in regard to the collection of fees under the circumstances of this case.

6. Although deponent has written to the Secretary of State for copies of the Articles of Incorporation of the corporations, on November 21st and again on December 2nd, he received no reply until December 7th, when the fee for such service was stated. On that date deponent forwarded the fee to the Secretary of State but as of this afteroon (December 13th) after the receipt of the only scheduled mail delivery, deponent has not received the copies of the said Articles of Incorporation.

However, during a telephone conversation with Mr. Neuborne on December 5th, he stated to the deponent that the Civil Liberties Union was not organized pursuant to Section 495 of the Judiciary Law, but that it is a membership corporation.

Assuming that to be the case, deponent respectfully submits that the said corporation does not have the authority to practice law, and that under the circumstances an award of legal fees cannot be made to it.

7. The New York Courts have very jealously supervised the privilege of practicing law and have circumscribed the right of corporations to engage in the practice.

A corporation not permitted to do so pursuant to Section 495 of the Judicial Law cannot practice law in the State of New York.

"It follows that the practice of law is not a lawful purpose for a corporation to engage in as it cannot practice law directly, it cannot indirectly by employing competent attorneys to practice for it, as that would be an evasion which the law will not tolerate."

Matter of Co-Operative Law Co.
198 N.Y. 479, p. 484

Thus, a membership corporation engaged "for purposes other than pecuniary profit" cannot represent a creditor in a bankruptcy proceeding.

Merill & Co. vs, National
Jewelers Board of Trade,
90 Misc. 19

Deponent requests the permission to file a supplemental affidavit when the Articles of Incorporation are received/

8. Not having complied with Section 495 of the Judiciary Law, counsel cannot collect any fees.

Even in the case of attorneys not admitted to practice in the State the privilege of recovering for their services has been denied.

Fein vs. Ellenbogen
84 N.S.Y., S. 2nd 789.

"The right to receive compensation for services rendered in the capacity of an attorney or counsellor at law is confined to those persons who are duly admitted and entitled to practice as such in the courts at the time that the services were rendered, and who were then in good standing. This is especially true to services rendered in violation of a statute prohibiting unlicensed persons from practicing law."

I Thornton, Attorneys at Law
Section 23, page 25

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

9. At various times during the proceedings, plaintiff's attorney appealed to the court for an early disposition on the grounds that the plaintiff was destitute. It may be presumed that plaintiff could not promises to pay any legal fees to the Civil Liberties Union; that the Civil Liberties Union did not expect any payment and that the Union rendered services on that basis.

Any award would be in the nature of a windfall to the Civil Liberties Union, which might be characterized as a gift.

The making of any such payment under these circumstances would be constitutionally impermissable.

Constitution, State of New York
Section 8

10. In any event, it is contended that this is not a case where attorneys fees should be allowed. The Stollberg case, cited by the Court, recognizes that "the award of attorneys fees is restricted to the exceptional case", and that the standard is whether "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy," or where a defense has been maintained in "bad faith, vexatiously, wantonly, or for oppressive reasons." 474 F. 2nd, 485 p. 490.

Here no such showings were made. Rather, the Board was acting in compliance with the decision of the Commissioner of Education of the State of New York that the plaintiff had acted improperly.

Not to have acted in accordance with the Commissioner's decision would have placed the Board in a position where the Commissioner was authorized to withhold State Aid from the District or to remove the members from office.

Sections 306 and 1706
Education Law

They defended this action consistent with their duty to comply with the Commissioner of Education's decision. They acted to sustain compliance with the Code of Ethics established jointly by the New York State Teachers Association and the New York State School Boards Association.

In addition, they acted in accordance with the provisions of the Johnson Memorandum, which was delivered to the school in the period between the Moratorium Days and directed school authorities to take heed that all points of views in connection with the observance of any activities in connection with the Viet Nam protests be presented.

Under the circumstances, since their actions cannot under any circumstances be considered unreasonable, the imposition of legal fees under the circumstances of this case is not justified.

11. The judgment and the record should contain all the relative facts as to the legal status of the Civil Liberties Union so that all issues raised may be disposed of on appeal.

12. Deponent requests that two references in His Honor's opinion be clarified.

AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

In the first paragraph on page 4 of the Decision, it is stated that,

> "on the plaintiff's motion for summary judgment the defendants urged that the wearing of the arm band by Mr. James caused disruption in the school and that they have an opportunity to prove it."

The inference is that the offer of proof referred to physical disruption. The defendants' contention throughout the litigation in this regard is summed up in paragraph 14 of the deponent's affidavit made in opposition to the motion for reinstatement, wherein he stated,

> "Defendants are prepared to present experts in the field of education who will testify that the wearing of the arm band under the circumstances materially and substantially jeoparized the interest of sound education."

Likewise, in the same paragraph His Honor stated that "both parties submitted briefs."

Deponent never received a brief from plaintiff's counsel after the trial. Plaintiff's counsel has assured deponent that no such brief was ever filed.

Deponent respectfully requests that these items be clarified.

HARRY TREININ
Attorney for the Defendants
11 East Market Street
Corning, New York 14830

Subscribed and Sworn to
before me this day
of December, 1974.

NOTARY PUBLIC

SUPPLEMENTAL AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES,

Plaintiff,

-vs-

AFFIDAVIT

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, CEntral District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF STEUBEN)

HARRY TREININ, being duly sworn, deposes and says:

1. That this affidavit is supplemental to the affidavit previously filed, dated December 13, 1974.

2. That annexed hereto are photostatic copies of the relevant portions of the Certificate of Incorporation of the American Civil Liberties Union, Inc. and the New York Civil Liberties Union, Inc.

3. It is to be noted that each of the corporations is incorporated pursuant to the former Membership Corporation Law of the State of New York. The statement of purpose of neither corporation includes the practice of law. In addition, the Certificate of the New York Civil Liberties Union, Inc., in paragraph Second b and Third in effect limits its actions to the Metropolitan area of New York. None of the parties reside or are located in the Metropolitan area. For the purpose of argument

HARRY TREININ
ATTORNEY AT LAW
11 EAST MARKET ST.
CORNING, N. Y.

assuming the validity of the corporation, the question of the corporation acting ultra vires is presented.

In the event one would care to equate the practice of law with "a trade or business", it is pointed out that subparagraph e provides that the corporation "shall not engage in any trade or business."

4. This action was commenced by the New York Civil Liberties Union, Inc. All the correspondence was carried on with Mr. Neuborne, who signed letters on stationary of the New York Civil Liberties Union, Inc. as staff counsel of that organization. Later communications were received on the stationary of the American Civil Liberties Union, upon which Mr. Neuborne is listed as assistant legal director of the legal department.

5. The handling of the case was conducted exclusively by Mr. Neuborne. He made all the appearances in Court, argued motions and the appeal, conducted the examinations before trial and tried the case in Court. He conducted all the correspondence, except when he was on vacation. It is evident that the participation of Mr. Neuborne was in the capacity of an employee of the Civil Liberties Union. Thus, we have the situation of a membership corporation, not approved by the Appellate Division of the Department where it is situated, pursuant to Section 495 of the Judiciary Law, paracticing law.

6. This situation comes within the condemnation of the New York Court of Appeals decision in the Matter of the Co-Operative Law Co., 198, N.Y. 479, and is illegal. (See also People Ex-rel Floersheimer vs. Purday, 174 App. Div. 694; Matter of Bensel, 68 Misc. Page 70.)

Even in cases where the Appellate Division does grant approval to a corporation to practice law, it is to

HARRY TREININ
ATTORNEY AT LAW
11 EAST MARKET ST.
CORNING, N. Y.

be noted that the petition is very closely scrutized, Matter of Action for Legal Services, 26 A.D., 2nd, 354, and that the powers granted are strictly limited. Matter of Pinkard, 28 A.D. 2nd 34.

It has been determined that even an organization to provide attorneys for persons involved in administrative proceedings must come within the provisions of Section 495 of the Judiciary Law and obtain the approval of the Appellate Division of the Supreme Court, pursuant to the Judiciary Law. Matter of Queens Lay Advocate Service, 71 Misc. 2nd, 33.

The fact that no fees are charged makes no difference. The statute must be observed. Even where one sought to appear in a justice court, not a court of record, without fee "for defendants who may choose petitioner as their choice of counsel" the Court had summarily denied the petition and held that no person may appear for anyone other than himself in any Court or before any magistrate of the State or give legal advice to another unless he has been licensed to practice as an attorney.

Jemzuria vs. McCue
74 Misc. 2nd 692.

The law is summed up in Matter of Pace, 170 A.D. 818. at page 824.

> "It may be taken, therefore, as the law of the State that it is unlawful for a corporation whether domestic or foreign to practice law in this State and that any member of our Bar who assists the corporation in violating the law in this respect is himself guilty of wrongdoing."

An attorney in that position (much less the corporation practicing law illegally) is in no position to receive a fee. Not only is this result dictated by the decisions (see paragraph 8, previous affidavit) but by the principal that no one should be permitted to profit from his own wrong. Riggs vs. Palmer, 155 N.Y. 516.

HARRY TREININ
ATTORNEY AT LAW
11 EAST MARKET ST.
CORNING, N. Y.

"The principal is fundemental that no man shall be permitted to profit by his own wrong. It enters by implication into all contracts and all laws."

Justice Cardoza
Peo. vs. Schmidt
216 N.Y., 321, page 341

7. The New York Courts have determined that a judgment obtained under the circumstances here present cannot stand.

Where the plaintiff, an attorney admitted to practice in Pennsylvania was retained to render legal services to a New York resident, and the services were performed in a jurisdiction where the plaintiff was not admitted to practice law, he was denied recovery of a legal fee. Under the circumstances, the judgment was void.

Kaplan vs. Berman
37 Misc. 502

In Puma vs. McGonigle, 73 Misc. 35, a judgment rendered on the motion of one as attorney for the plaintiff, who was not admitted to practice, was held void.

Likewise, in Colton vs. Oshrin, 155 Misc. 383, where the Court found that the representation was by one not admitted to practice in the courts of the State, the Court held,

"that all the proceedings had are nugatory and void."

(Penal Law, Sec. 271, 272; Kaplan vs. Berman, 37 Misc. 502; People vs. James, 150 id. 390, 393; Newberger vs. Campbell, 9 Daly, 102; Puma vs. McGonigle, 73 Misc. 35.)

The Court further stated:

"It is not suggested that the defendant or his attorney of record was aware of the facts with reference to Mr. Weiss, nor is it especially important that the objection was not raised by the plaintiff's counsel sooner. The result is the same. The cases above cited presumably are based on the theory that it would be subversive of the correct administration of justice and of our Courts to permit unauthorized persons to practice as attorneys therein. It is, therefore, not a matter of penalizing any one (other than persons guilty of the offense), but, rather, a matter of vindicating the dignity of the Court and of an honorable profession that the rule has been established that all proceedings participated in by such an unauthorized person are

HARRY TREININ
ATTORNEY AT LAW
11 EAST MARKET ST.
CORNING, N. Y.

SUPPLEMENTAL AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

rendered nugatory and ineffectual. In this view, therefore, actual prejudice to any party need not be shown, but is conclusively presumed."

Likewise, in People vs. James, 153 Misc. 390, page 393, the Court states,

"It was the opinion of the Court on the argument that the fact that Mr. Sandway conducted the prosecution, although in violation of this section, would not have any effect upon the judgment rendered by the court. On consulting the authorities the court finds itself in error and the cases all seem to hold that where a trial is conducted by a person who is forbidden to conduct the trial of the same it renders the judgment void." (Kaplan vs. Berman, 37 Misc. 502; Newberger vs. Campbell, 58 How. Pr. 313; Puma vs. McGonigle, 73 Misc. 35.)

Proceedings in a suit by a person not entitled to practice are a nullity, and the suit will be dismissed. If the cause has proceeded to judgment, the judgment will be reversed.

6 Corpus Juris, Page 570
Section 13
7 Corpus Juris Secumdum
Page 725, Section 16

WHEREFORE, deponent respectfully requests judgment be declared void.

HARRY TREININ
Attorney for the defendants

Subscribed and Sworn to before
me this 20th day of December, 1974.

NOTARY PUBLIC

HARRY TREININ
ATTORNEY AT LAW
11 EAST MARKET ST.
CORNING, N. Y.

PORTIONS OF CERTIFICATE OF INCORPORATION, ANNEXED TO AFFIDAVIT OF HARRY TREININ.

BOARD OF REGENTS
11 North Pearl St.
Albany, N. Y.

CERTIFICATE OF INCORPORATION

of

NEW YORK CIVIL LIBERTIES UNION, INC.

(Pursuant to the Membership Corporations Law.)

WE, the undersigned, a committee of NEW YORK CITY CIVIL LIBERTIES COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION, an unincorporated association, not organized for pecuniary profit, having been duly authorized to incorporate the said association, and all being of full age, at least two-thirds (2/3) being citizens of the United States, and at least one of them being a resident of the State of New York, desiring to incorporate said association, DO HEREBY CERTIFY:

FIRST: The name of the proposed corporation shall

NEW YORK CIVIL LIBERTIES UNION, INC.

SECOND: The purposes for which it is to be are:

(a) To function as an affiliate of the AMERICAN CIVIL LIBERTIES UNION, INC., and to take over, carry on, and [illegible] the affairs, property, obligations, business

550f-41-1

PORTIONS OF CERTIFICATE OF INCORPORATION, ANNEXED TO AFFIDAVIT OF HARRY TREININ

and objectives of the unincorporated association known as New York City Civil Liberties Committee of the American Civil Liberties Union.

(b) To safeguard within the Metropolitan area of New York, the rights of free speech, free press, free assemblage, free religion and other civil rights and liberties, and to take all legitimate action in furtherance of such purposes, and such objectives.

(c) To do any and all lawful acts and things which may be necessary, useful, suitable, desirable or proper for the furtherance of, accomplishment or attainment of, any or all of the aforesaid purposes and objects.

(d) To accept, receive, hold, invest and use for the furtherance of any of the purposes and objects of the corporation, gifts, legacies, bequests, devises, grants, funds, benefits or trusts (but not to act as trustee of any trust) and moneys earmarked for special purposes perfectly and in conformity with the aforesaid purposes and objects, all of which from any source whatsoever, and to borrow money for any of the aforesaid purposes and objects.

(e) The corporation shall not engage in any trade or business and shall not be conducted or operated for profit, nor shall any of its funds or property be paid to or inure to be the benefit of any members of the corporation or any individuals having a personal and private interest in the activities of the corporation except as reasonable com-

55 Civ. 61 -2-

PORTIONS OF CERTIFICATE OF INCORPORATION, ANNEXED TO AFFIDAVIT OF HARRY TREININ

CERTIFICATE OF INCORPORATION

-of-

AMERICAN CIVIL LIBERTIES UNION, INC.

Pursuant to the Membership Corporations Law.

We, THE UNDERSIGNED, desiring to form a Membership Corporation pursuant to the provisions of the Membership Corporations Law, all being of full age; at least two-thirds being citizens of the United States; at least one a resident of the State of New York and at least one of the persons named as a director being a citizen of the United States and a resident of the State of New York, HEREBY CERTIFY and state as follows:

FIRST: The name of the proposed corporation shall be AMERICAN CIVIL LIBERTIES UNION, INC.

SECOND: The purposes for which it is to be formed are as follows:

To maintain throughout the United States and its possessions, the rights of free speech, free press, free assemblage and other civil rights, and to take all legitimate action in furtherance of such purposes.

THIRD: The operations of said corporation are principally to be conducted in the United States of America, and in the territories and possessions of the United States of America.

FOURTH: The principal office of said corporation shall be located in the City, County and State of

REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES, Plaintiff, -against- THE BOARD OF EDUCATION OF CENTRAL DISTRICT 1, et al., Defendants.	REPLY AFFIDAVIT

BURT NEUBORNE, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein and I make this affidavit in support of plaintiffs' motion to amend the judgment entered herein on November 19, 1974 to provide a) for the payment of reasonable attorneys' fees and b) for the entry of appropriate pre-judgment interest on the "back pay" amounts found owing to plaintiff. This affidavit is made in response to the affidavit of Harry Treinin, Esq., dated December 20, 1974 and December , 1974 (undated).

Attorneys' Fees

2. Defendants urge the Court to deny an award of attorneys' fees and, indeed, to consider re-opening the judgment itself on the ground that the American Civil

Liberties Union is not permitted to provide counsel to persons in New York State because it has not been authorized to do so pursuant to Section 495 of the Judiciary Law. The short answer to defendants' assertion is that the American Civil Liberties Union is, and has for some years been, authorized to provide legal services and to receive court-awarded fees pursuant to Section 495 of the Judiciary Law. A copy of the most recent order of the Appellate Division granting such authorization is annexed hereto as Exhibit 1. Moreover, even in the absence of such authorization, it would raise the most serious constitutional problems to forbid private associations to offer the services of attorneys who are personally subject to the discipline of both the state and federal courts to persons whose constitutional rights have been violated. Given the conceded amenability of counsel to normal discipline, no state interest would seem to be served by requiring organizational registration as well. Fortunately, however, no such issue arises in the instant case because the American Civil Liberties Union has chosen to comply with the requirements of Section 495 of the Judiciary Law.

Pre-Judgment Interest

3. The award of pre-judgment interest in New York State is governed by Section 5001 CPLR, which provides broadly for pre-judgment interest as a matter of right in legal actions

for the interference with or deprivation of property rights. Pre-judgment interest is discretionary when the action in question sounds in equity.

4. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court ruled that the unconstitutional dismissal of a public school teacher for engaging in First Amendment activity would constitute a taking of "property" within the meaning of the 14th Amendment. Accordingly, it is clear that plaintiff's action to recover his damages flowing from unlawful dismissal must be deemed an action for interference with or deprivation of classic property rights.

5. Moreover, since 42 U.S.C. §1983 provides for liability "at law" as well as "in equity," plaintiff's action sounds in law, thus entitling him to pre-judgment interest as a matter of right.

6. Defendants urge the Court to recognize Gordon v. Board of Education, 52 Misc. 2d 175, 274 N.Y.S.2d 543 (Kings Co., 1966) as a bar to the award of pre-judgment interest. However, Gordon is distinguishable on at least two grounds:

a) First, it was decided six years prior to the recognition by the Supreme Court in Perry and Roth that the unconstitutional dismissal of a teacher invaded a classic "property" right -- thus triggering the provisions of Section 5001 CPLR;

b) Second, Gordon was an Article 78 proceeding in which the court found that the petitioner's primary aim was reinstatement. Accordingly, the Gordon court treated the action as one sounding in equity, permitting it discretion in the award of pre-judgment interest. In the instant case, defendants have insisted upon bifurcating James I (back pay)and James II (reinstatement). Since James I sounds solely at law, no discretion to refuse to award pre-judgment interest exists.

7. In addition to challenging the availability of pre-judgment interest, defendants challenge its computation:

a) Defendants urge that the General Municipal Law places a 3 per cent interest ceiling on awards against school boards. While the Municipal Law may limit the interest which Centeral School District No. 1 may be assessed, it cannot shield the individual defendants from liability. Whether the individual defendants can require appropriate contribution on pre-judgment interest despite the 3 per cent ceiling remains unsettled. See, Jones v. All Boro Car Leasing, 67 Misc.2d 567, 325 N.Y.S.2d 535 (Civil Ct., 1971). However, it is clear that they cannot utilize the interest ceiling on one defendant to set an artificial interest ceiling on all.

b) While compound interest is ordinarily not recoverable, exceptions have been recognized when necessary to do substantial justice. Where, here, plaintiff has been unconstitutionally deprived of a living wage for several years, he cannot

be adequately compensated without taking into account the injury suffered in depriving him of the use of his wages. Only compound interest can accurately reflect such damage. Accordingly, plaintiff suggests the appropriateness of compound interest herein.

Plaintiff respectfully requests, therefore, that the motion to amend the judgment herein be granted in all respects. Alternatively, plaintiff requests that an order be entered a) recognizing the award of reasonable attorneys' fees and b) directing the computation and entry of non-compound pre-judgment interest at the prevailing legal rate.

B. Neuborne

BURT NEUBORNE

Sworn to before me this
26th day of December, 1974.

Eve Carr

NOTARY PUBLIC

1976

EXHIBIT 1, ANNEXED TO REPLY AFFIDAVIT OF BURT NEUBORNE--
ORDER OF APPELLATE DIVISION.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 18, 1974

Present--Hon. Owen McGivern Presiding Justice,
Arthur Markewich,
Emilio Nunez,
Theodore R. Kupferman,
Francis T. Murphy, Jr. Justices.

In the Matter of the Application for Approval of

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Pursuant to Sec. 495, Judiciary Law

M-1676

Issued

ORDER

Upon reading and filing the petition of ACLUF, verified the 14th day of February, 1974, by its Executive Vice President, Aryeh Neier, and the Memorandum submitted in support of said petition and upon motion of the petitioner, and after due deliberation, it is

ORDERED, that the existence and organization of ACLUF be and hereby is approved pursuant to Section 495 of the Judiciary Law [and subject to the provisions of Section 608 of the Rules of this Court;] and it is further

ORDERED, that ACLUF is empowered to furnish, through counsel, a full range of legal services to persons or organizations involved in litigation or other disputes concerning civil liberties or civil rights; and it is further

EXHIBIT 1, ANNEXED TO REPLY AFFIDAVIT OF BURT NEUBORNE

ORDERED, that ACLUF shall provide its legal services without fee, except that it may accept counsel fees awarded to it by a court; and it is further

ORDERED, that in accordance with Section 608.6 the requirements thereof with respect to the membership of the governing board shall not apply to this corporation which was heretofore organized and approved; and it is further

ORDERED, that ACLUF may publish, distribute and disseminate information concerning the services it has rendered and may render; and it is further

ORDERED, that this order of approval shall remain in effect indefinitely subject to the provisions of sec. 608.9 of the rules of this court.

Enter
FOR THE COURT

Presiding Justice

APPELLATE DIVISION-SUPREME COURT-FIRST DEPARTMENT
STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared the annexed with the original thereof filed in said office on JUL 18 1974 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on JUL 18 1974

Clerk

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES,

Plaintiff,

-vs- Civil 1971-164

BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1, et al.,

AFFIDAVIT

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF STEUBEN)

HARRY TREININ, being duly sworn, deposes and says:

1. I am the attorney for the defendants and make this affidavit in response to the reply affidavit sworn to by Mr. Neuborne on December 26, 1974.

2. The above action was commenced by the New York Civil Liberties Union. The Complaint was signed by it and all the briefs were filed under that name. Most of the communications were on the atationary of that organization, signed by Mr. Neuborne as staff counsel. Other communications signed by Mr. Neuborne were on the stationary of the American Civil Liberties Union. There he is listed as Assistant Legal Director of the organization.

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

3. The proposed findings of fact and conclusions of law were signed by Mr. Neuborne without reference to any organization, and gave his address as New York Law School. It is to be noted that the notice of motion under consideration is similarly signed.

4. No order or stipulation of substitution of attorneys has ever been filed.

5. Under these circumstances, of what relevance is it that the American Civil Liberties Union Foundation is authorized to provide legal services, is difficult to comprehend. The point in issue is what is the authority of the New York Civil Liberties Union.

To substantiate his claim that the New York Civil Liberties Union has authority under Section 495 of the Judiciary Law, counsel submits a copy of an order authorizing the Foundation to so act. How the authority of the Foundation enlarges the powers of the Union is not set forth. Neither is it explained how that order supports counsel's contention that "the American Civil Liberties Union is, and has for some years, been authorized to provide legal services and receive Court awarded fees pursuant to Section 495 of the Judiciary Law." (Paragraph 2, Mr. Neuborne's affidavit)

6. In any event, it is to be noted that the order granting the Foundation authority was dated July 18, 1974, a date after the trial of this action was completed.

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

7. It may also be noted that the petition for the American Civil Liberties Union Foundation was served only upon the Attorney General and not the Bar Associations designated and required to be served by Rule 608.2 of the Appellate Division First Department. While it is academic in our situation, such lack of service on the Bar Associations might well be regarded jurisdictionally deficient and the validity of the entire order may be put under challenge.

8. Counsel also makes reference to the fact that the American Civil Liberties Union is "and has been for some years authorized to provide legal services." (paragraph 2) Papers attached to Mr. Neuborne's affidavit do not supply the proof for that assertion, since the only order attached to the affidavit, as pointed out above, refers to the Foundation and is dated July 18, 1974.

9. However, copies of papers on file in the office of the Clerk of the Appellate Division First Department indicate that on July 21st, 1966 the Roger Baldwin Foundation of A.C.L.U.,Inc. was recognized "for the purpose of providing or assisting to obtain legal counsel without cost for persons involved in activities wherein their civil rights and liberties .... are threatened or infringed upon and who are unable to obtain such counsel without assistance." An approval was given under the then provisions of Section 280, Subdivision 5 of the applicable

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

Penal Law of the State of New York. In the petition for Foundation approval it is alleged that "the Foundation was organized in 1966 under the name of the Roger Baldwin Foundation, Inc."

The rules of the Appellate Division First Department 608.5 provide that the order of initial approval shall be limited to approval for not more than three (3) years. Even the prior approval was not effective during the time this action was instituted and carried out.

10. The fact remains that the proof only shows the powers granted to the Foundation and there is no proof that the New York Civil Liberties Union was ever authorized by the Appellate Division to engage in the practice of law as provided by Section 495, Subdivision 5 of the Judiciary Law.

11. All that the order of July 18, 1974 proves is that it is recognized that approval by the Appellate Division pursuant to Section 495 of the Judiciary Law is required before a corporation can exercise the powers the the New York Civil Liberties Union attempted to exercise in this case. No claims are made for the New York Civil Liberties Union.

Under the circumstances, having relied on the law giving the Foundation authority can it properly question the constitutionality of its requirement?

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

12. The submission of the order in reference to the Foundation only emphasizes the error committed by the New York Civil Liberties Union in proceeding with this action. It enforces the claim formerly made by the defendants that an award to the New York Civil Liberties Union for counsel fees violates the law of the State of New York and would reward the wrongdoer. Having violated the law the Civil Liberties Union does not come into Court with clean hands. It is again emphasized that never at any time was there ever any stipulation or order providing for the substitution of attorneys filed in this case.

13. Reference to the complaint in the action indicates that the plaintiff requests a declaration of rights in several respects and that he be granted damages. In a memorandum in support of plaintiff's application for back pay and reinstatement filed with the Court, the contention was made in behalf of plaintiff that,

> "Moreover, a claim for back pay arising out of an unconstitutional dismissal has repeatedly been held to constitute a discrete element of equitable relief unrelated to the existence of traditional compensatory and punitive damages."
>
> (Underlining supplied)

Whereas, heretofore he proceeded on the theory that this action was equitable in nature, he how claims that it is an action at law entitling the plaintiff to interest as a matter of right.

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

14. Section 5001 of the CPLR in its reference to property states that interest shall be received upon a sum awarded because of an act or omission depriving or otherwise interfering with title to, or possession of, or enjoyment of property." The reference to title in conjunction with possession and enjoyment clearly indicates that the legislature referred to real property alone.

15. The reference to the Roth case is inapplicable. That case indicates that under circumstances there outlined the expectancy of rehiring may amount to a property right. Here nothing in the decision in our case indicates that Mr. James' rights were denied to him under the circumstances meeting the criteria established by Roth.

Here plaintiff does not complain that his expectany of rehiring for a second year was not fulfilled. Here plaintiff was dismissed in mid-semester becasue of the controversary that arose.

16. Counsel stater that interest should be charged against the individual defendants at 6%, failing to note that the defendants other than the School District are named in their representative capacities as agents of the School District. No action is brought against them as individuals and under the circumstances the 3% interest provided by the statute is applicable.

RESPONDING AFFIDAVIT OF HARRY TREININ IN OPPOSITION TO MOTION

17. In his previous affidavit deponent has cited many cases holding that compound interest is not permissible under New York Law. It is to be noted that counsel cites no cases to support his contention that under the circumstances compound interest is appropriate.

H Treinin L.S.
HARRY TREININ

Subscribed and Sworn to
before me this 31st day of
December, 1974.

NOTARY PUBLIC

SECOND REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES Plaintiff. -against- THE BOARD OF EDUCATION OF CENTRAL DISTRICT N.I. et al. Defendant.	SECOND REPLY AFFIDAVIT

State of New York) ss:
County of New York)

BURT NEUBORNE, being duly sworn, deposes and says:

I Introduction

1. I represent the plaintiff herein and I make this second reply affidavit in response to the reply affidavit of Harry Treinin, Esq., dated December 31, 1974.

2. At the outset, counsel vigorously takes issue with Mr. Treinin's assertion that the Civil Liberties Union has acted as a "wrongdoer" herein and "does not come into Court with clean hands." It is particularly ironic that such charges should be hurled on behalf of defendants who have obdurately refused to comply with the constitution and who now seek to avoid the payment of counsel fees, occasioned by their own misconduct.

SECOND REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION

3. Counsel wishes to emphasize that throughout this action the Civil Liberties Union has sought merely to provide counsel to plaintiff - much in the same manner as the Addison School Board has provided free counsel to the individual defendants herein. To suggest that such activity constitutes "wrongdoing" smacks of the attempts to deny persons access to the courts which precipitated NAACP v. Button, 371 U.S. 415(1963); Brotherhood of Railroad Trainmen v. Virginia,377 U.S. 1 (1964); United Mineworkers v. Illinois Bar Association, 389 U.S. 217 (1967); and United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

4. Throughout this action counsel has been subject to the discipline of the State and Federal courts, as well as the appropriate bar association. If Mr. Treinin wishes to complain of any "wrongdoing" by counsel or by the ACLU, he need only file an appropriate complaint. As an ACLU lawyer, I take full, personal, responsibility for the conduct of my litigation. Once I undertake a case, I am governed solely by the responsibilities arising out of the attorney-client relationship. Were the ACLU, or any organization, to seek to control or to dictate my actions as an attorney, I would resign from such organization immediately. In the ten years that I have functioned in various capacities as an ACLU lawyer, I have never been interfered with, or even importuned, by any

member or official of the ACLU in connection with the conduct of any case. I take it as a personal affront for Mr. Treinin to suggest that my activities as an ACLU lawyer require greater scrutiny than do his as an attorney for the Addison School Board.

II The Award of Counsel Fees to the ACLU Foundation

5. Mr. Treinin suggests a number of grounds for disqualifying the ACLU from receiving counsel fees. First, he suggests that the registration of the ACLU in 1966 and again in 1974 is not sufficient compliance with Section 495 of the Judiciary Law. Second, he argues that registration by the ACLU Foundation is not sufficient to enable the ACLU's New York State chapter (New York Civil Liberties Union) to function. In order to clarify the issue, counsel proposes to describe the structure of the ACLU and to recount counsel's relationship with the ACLU during this litigation.

A. Counsel's Relationship with the ACLU Foundation

6. Counsel first functioned as an ACLU counsel in 1965 as an associate with the firm of Casey, Lane & Mittendorf in New York City. As an ACLU volunteer attorney, I handled numerous cases without fee from 1965-1967, at the request of both the national office and the New York State chapter of the ACLU (NYCLU). In 1967, I became an ACLU

staff counsel for New York State. I remained an ACLU staff counsel until January 1973. From 1967 - January 1973, I handled ACLU litigation in New York state, as well as ACLU litigation in South Carolina, Pennsylvania, New Mexico, Colorado, Kansas, California and Texas. I was generally responsible to the ACLU Legal Director, but, once a case commenced, I undertook personal responsibility for my litigation. In January 1973, I became Assistant Legal Director of the ACLU. My duties included supervising the activities of chapter staff counsel throughout the United States, including New York State. In addition, I continued to function as an ACLU lawyer in New York State and elsewhere. In September, 1974, I resigned as Assistant Legal Director and commenced my present duties as an Associate Professor of Law at New York University Law School. Although I no longer receive financial compensation from the ACLU, I continue to be actively engaged in ACLU litigation, spending approximately twenty hours per week on ACLU cases. I continue to function under the general supervision of the ACLU Legal Director, but with personal responsibility for my caseload. Thus, during my tenure as counsel for the plaintiff herein, I have served as an ACLU staff counsel for New York State, Assistant Legal Director of the ACLU and as an ACLU volunteer attorney. In each of those capacities, my sole responsibility was to provide effective counsel to Mr. James.

SECOND REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION

B. The Structure of the ACLU

7. The ACLU consists of a national staff, located in New York City. The national office consists of a non-tax deductible arm, which engages in public information and lobbying(the ACLU) and a tax deductible arm(the ACLU, Foundation) which provides legal services to persons who have been deprived of constitutional rights. The national office charters state branches of the ACLU, which now exist in every state with the exception of Wyoming, North Dakcta and South Dakota. Each state chapter elects delegates to a national Board of Directors which establishes ACLU policy. NYCLU is the ACLU state chapter for New York State. Each member of the ACLU automatically becomes a member of her or his state affiliate. Each state affiliate operates under the general supervision of the national Board of Directors and participates in a complex financial allocation formula pursuant to which the national ACLU distributes dues and contributions between the national office and the respective state chapters. Any attorneys' fees received herein would be payable to the ACLU Foundation.

C. The Registration of the ACLU Under Section 495

8. In 1956 and again, after the Appellate Division had modified certain rules, in February 1974, the ACLU, Foundation sought and received authorization to offer legal

services in New York State. At all times herein, whether counsel operated as an ACLU staff counsel for New York State; ACLU Assistant Legal Director; or as an ACLU volunteer attorney, I was acting under the auspices of the ACLU Foundation and fully in compliance with Section 495 of the Judiciary Law.

9. Mr. Treinin's suggestion that the initial authorization of the ACLU, granted in late 1966, expired in 1969 is incorrect. ACLU's initial authorization in 1966 contained no expiration date. No such expiration date was included until the promulgation of Rule 608 by the Appellate Division in 1971. ACLU was exempted from re-applying under the newly promulgated Rule 608 until the completion of litigation challenging the constitutionality of Section 495. At the completion of such litigation the ACLU made timely application and received Section 495 authorization. It should be noted that the most recent authorization, a copy of which is annexed to counsel's initial reply affidavit, explicitly authorizes the receipt of court-awarded counsel fees by the ACLU Foundation.

10. Thus, far from acting, in Mr. Treinin's words, "wrongfully" or with"unclean hands" the ACLU has consistently complied with a registration statute which we believe to be of doubtful constitutional validity and which seems to cast

unfair aspersions upon the integrity of attorneys engaged in public interest litigation. No basis whatever exists for questioning the propriety of an award of counsel fees to counsel herein for transmission to the ACLU Foundation.

11. Although counsel in no way urges that the Court do so, in the event it perceives an obstacle to the award of counsel fees to the ACLU Foundation(counsel perceives no such obstacle), an award of counsel fees individually would be appropriate to assure that similarly situated plaintiffs have access to adequate counsel in the future.

III Pre-Judgment Interest

12. A brief review of the authorities construing Section 5001 CPLR exposes the fallacy of Mr. Treinin's suggestion that it refers solely to actions involving real property. Eg. In the Matter of D. v. O., 77 Misc. 2d 938, 355 NYS 2d 283(Family Court, New York City) (per. Dembitz, J.) (granting pre-judgment interest on support payments from date each became due under 5001 CPLR). See also, Flamm v. Noble, 296 NY 262, 72 NE 2d 886 (1947) noting that pre-judgment interest is essential to complete indemnity and Matter of Kavares, 29 AD 2d 68, 285 NYS 2d 983 (1st Dept. 1967) noting that pre-judgment interest is an element of compensation for delayed payment.

SECOND REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION

13. Mr. Treinin's attempt to characterize the damage award as equitable is also erroneous. (Of course, even if one views the award as equitable, the Court is granted discretion under 5001 CPLR to award pre-judgment interest). The extract from the memorandum which he quotes in paragraph 13 of his reply affidavit was filed by plaintiff in the hope of having his claims for back pay and reinstatement herein heard simultaneously. However, as Mr. Treinin may recall, he strenuously objected to such a procedure and insisted upon bifurcating the legal and equitable aspects of this action into James I and James II. Moreover, Mr. Treinin has demanded a jury trial on the back pay issues of James II, indicating his belief that they sound in law, since claims sounding in equity are not entitled to a jury trial.

14. Finally, Mr. Treinin's attempt to equate the individual defendants with the Addison School Board for the purpose of interest computation cannot withstand analysis. Beginning with Monroe v. Pape, 365 U.S. 167 (1961) and continuing through Scheuer v. Rhodes, US (1974) the Supreme Court has consistently recognized that "persons" sued under 42 USC §1983 may not invoke the immunities and defenses of government entities, but must stand as individuals before the law. Whatever the scope of the liability of the Addison School Board, the individual defendants, sued as "persons" under Section 1983, cannot avoid their responsibilities by asserting defenses available only to a government entity.

SECOND REPLY AFFIDAVIT OF BURT NEUBORNE IN SUPPORT OF MOTION

15. Mr. Treinin is correct in asserting that awards of compound interest are not favored. However, when necessary to provide adequate relief to a civil rights' plaintiff, this Court possesses power to prescribe that plaintiff, be compensated for the deprivation of a living wage. Plaintiff suggests that such compensation can best be expressed by a compound interest computation. However, the difference between simple pre-judgment interest computed at the appropriate legal rate (7 1/2 percent) and the compound interest computation prepared by plaintiff at 6 percent will not be sufficiently substantial to warrant extensive argument.

WHEREFORE, deponent prays that:

(1) the award of attorney's fees to counsel on behalf of the American Civil Liberties Union Foundation be confirmed; and

(2) pre-judgment interest be computed herein on the basis of a 6 percent compound computation, or, in the alternative, a simple computation at the appropriate legal rate.

Sworn to Before Me
This 9th Day of January , 1975

Phyllis B. Goldberg

PHYLLIS B. GOLDBERG
Notary Public, State of New York
No. 31-0502500
Qualified in New York County
Commission Expires March 30, 1976

B. Neuborne

Burt Neuborne

DECISION AND ORDER OF CURTIN, J., DATED JANUARY 30, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES,

Plaintiff,

-vs- Civil 1971-164

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; HOWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

APPEARANCES: BURT NEUBORNE, ESQ.
American Civil Liberties Union
New York, New York
for Plaintiff.

HARRY TREINIS, ESQ.
Corning, New York
for Defendants.

Plaintiff has moved for awards of pre-judgment interest and attorney's fees.

Turning first to the issue of pre-judgment interest, in an action like the instant one, brought under 42 U.S.C. §1983, "both federal and state rules on

damages may be utilized, whichever better serves the policies expressed in the federal statutes." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969); 42 U.S.C. §1988. Applicable New York law provides:

> Interest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

N. Y. Civ. Prac. Law & Rules §5001 (McKinney 1963).[1] Defendants argue that if plaintiff has an interest claim at all, it should be considered as an equitable one. However, it is clear that the free speech interest protected by the awarding of damages in this case is a property interest. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 601 (1972). On the question of the interest rate to be assessed against defendants, there are two controlling provisions of New York law. Section 5004 of the New York Civil Practice Law & Rules sets forth a 6% annual interest rate. However, §3-a(1) of the General Municipal

Law which applies to school districts specifies a 3% annual interest rate ceiling on judgments against a municipal corporation. §3-a(1) of the General Municipal Law should be read and applied with reference to CPLR §§5001-5003. Acme Builders, Inc. v. County of Nassau, 36 App.Div.2d 317, 320 N.Y.S.2d 289 (1971), aff'd, 31 N.Y.2d 924, 340 N.Y.S. 2d 924, 293 N.E.2d 92. The Acme case also said that CPLR §5004 should be applied with CPLR §5001 when no special interest-rate statute is involved. 320 N.Y.S.2d at 292. In this case there are individual and municipal defendants. The court determines that the 3% limitation applies only to the municipal corporation defendant, the Board of Education, but that as to the other defendants the 6% annual interest figure should apply. The rate of pre-judgment interest is assessed as follows. The rate of 3% per annum shall be assessed upon the Board of Education, and 6% per annum upon each of the remaining named defendants. Plaintiff's request for compound interest is denied.

As to the award of attorney's fees ordered by this court in its decision of November 18, 1974, defendants

object that the New York Civil Liberties Union has no authority to receive such fees under state law. This court is in total accord with Judge Frankel's reasoning in the case of Aspira of New York, Inc., et al. v. Board of Education of the City of New York, et al., 72 Civ. 4002 (S.D.N.Y., Jan. 2, 1975). In discussing an argument similar to that of the defendants in this case, Judge Frankel said:

> There is an argument by defendants that an Appellate Division rule governing legal services organizations including the Puerto Rican Legal Defense & Education Fund, Inc., "does not authorize" this Fund's receipt of any "fee or compensation," and that this should preclude the award plaintiffs seek unless "specifically provided in the order of the Appellate Division." It ought to be enough to mention comity, let alone the Supremacy Clause; defendants can scarcely mean that the federal court, administering federal law, must seek a state court order before granting an application like the one here presented. See Jordan v. Fusari, 496 F.2d 646, 649 n.3 (2d Cir. 1974).

Plaintiff's application for a reasonable attorney's fee is granted. Counsel are directed to

confer to attempt to agree upon the amount of the reasonable attorney's fee. If an agreement cannot be reached, plaintiff shall file a detailed statement setting forth the reason for the granting of a fee. This filing shall be made not later than March 3, 1975. Defendants may respond not later than March 17, 1975.

Pre-judgment interest in the amount of 3% per annum is granted against the Board of Education, and in the amount of 6% per annum against each of the other named defendants.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: January 30, 1975

---

1 New York law is referred to on the pre-judgment interest issue because it contains a definite standard. In this case the state rule on damages serves the policies expressed in the federal statutes as it provides specifically for the deprivation of property. See Sullivan v. Little Hunting Park, Inc., supra.

JUDGMENT APPEALED FROM, DATED JANUARY 30, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHARLES JAMES, Plaintiff -vs- THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BORWN, District Principal Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1, Defendants	Judgment Civ-1971-164

This action came on for hearing before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issued having been duly heard and a decision having been rendered,

IT IS ORDERED and ADJUDGED that the plaintiff, Charles James, have judgment against all the defendants named herein in the amount of Twenty Thousand Nine Hundred Sixty-Four dollars and Twenty-Five Cents ($20,964.25). Pre-judgment interest in the amount of 3% per annum is granted against the Board of Education, and in the amount of 6% per annum against each of the other named defendants, and his costs of the action.

Dated at Buffalo, New York, this 30th Day of January, 1975.

JOHN K. ADAMS

JOHN K. ADAMS,
Clerk of Court

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

- -X

CHARLES JAMES,

Plaintiff,

vs

THE BOARD OF EDUCATION OF CENTRAL DISTRICT No. 1 of the Towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School; and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

Civil 1971-164.

- -X

Notice is hereby given that all of the defendants hereby appeal to the United States District Court of Appeals for the Second Circuit from the final judgment of the Court entered in the above action on the 19th day of November, 1974, and from the subsequent judgment entered in the above action on the 31st day of January, 1975; especially, from those parts of said judgments granting judgment to the plaintiff against the defendants in the sum of $20,964.25; granting

prejudgment interest to the plaintiff; granting prejudgment interest against the individual defendants in their representative capacities at the rate of six per cent (6%) per annum and granting plaintiff attorney fees.

DATED: February 12, 1975

HARRY TREININ
Attorney for the Defendants
11 East Market Street
Corning, New York 14830